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A TREATISE

ON THE

CONSTITUTION AND JURISDICTION

OF THE

UNITED STATES COURTS

ON PLEADING, PRACTICE AND PROCEDURE THEREIN AND ON THE POWERS AND DUTIES OF

UNITED STATES COMMISSIONERS

WITH

RULES OF COURT AND FORMS

BY

HON. A. H. GARLAND

LATE ATTORNEY-GENERAL OF THE UNITED STATES

AND

ROBERT RALSTON ESQ.

FORMER ASSISTANT U. S. ATTORNEY FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASSISTED BY

JOHN H. INGHAM ESQ.

OF THE PHILADELPHIA BAR

IN TWO VOLUMES

VOLUME I

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PREFACE.

THE purpose of the present treatise is to cover the whole subject of the Jurisdiction and Practice of the Federal Courts including the Court of Claims, the Courts of the District of Columbia and the Courts of the Territories.

During the last ten years the Jurisdiction of the Federal Courts has been the subject of important legislation, the most noteworthy statute being that by which the Circuit Courts of Appeals were established. These changes and their effects are fully set forth in the appropriate chapters.

A chapter is devoted to proceedings before United States Commissioners. The jurisdiction and powers of the Interstate Commerce Commission are also fully discussed.

A large collection of useful forms has been added to the work. The Rules of Court are also given in full, and especial attention is called to the manner in which the Rules of the Circuit Courts of Appeals are arranged so as to give due effect to their correspondence and variations in the different Circuits.

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FEDERAL PLEADING, PRACTICE AND PROCEDURE.

CHAPTER I.

JUDICIAL POWER OF THE UNITED STATES.

Independent Powers of the Legislative, Judicial and Executive Departments.

§ 1. The wisdom of those concerned in framing the Constitution of our government is nowhere more conspicuous than in those provisions of it which relate to the judicial power. They were familiar with the theories of political philosophers as well as the experiences of other nations in their efforts to establish free governments, and, with the knowledge derived from these sources, they wisely resolved that our government should consist of three departments—legislative, judicial and executive—each having powers to be exercised independent of the others. These elements had been urged as essential to the success of a free government by patriots, statesmen and speculative philosophers, and it was believed by them, if not generally regarded as a maxim, that these three necessary departments of a government should be kept separate and distinct and independent of each other.

The distinguished political writer Montesquieu had maintained this doctrine with great force and vigor in his commentary on the English Constitution, wherein he observed: "When the legislative and executive powers are united in the same person or in the same body of magistrates there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws or execute them in a tyrannical man-

ner;" that were the judicial power "joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator;" and that "where it is joined to the executive power, the judge might behave with violence and oppression." And he concludes by saying: "There would be the end of everything were the same man, or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."[1]

Sir William Blackstone had also impressed the necessity of an independent exercise of these functions of a well-regulated government, in his usual terse and forcible style. In his Commentaries on the Laws of England, he observes: "In all tyrannical governments the supreme magistracy, or the right both of making and of enforcing laws, is vested in the same man, or one and the same body of men; and wherever these two powers are united together there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of his own independence, and therewith of the liberty of the subject."[2]

In Kilbourn *v.* Thompson,[3] Mr. Justice Miller said: "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether State or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the success-

[1] Montesquieu, B. 11, ch. 6.
[2] 1 Bl. Com. 146. See also The Federalist, No. 47.
[3] 103 U. S. 168.

ful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

It requires no argument to show the importance of a judiciary department of the government of all civilized people, or that the scope of judicial power should be co-extensive with the legislative department. If it were otherwise there would be no power to enforce the rights of persons, and there would be no remedy for a violation of those rights.

On this subject Mr. Story observes: "Where there is no judicial department to interpret, pronounce and execute the law, to decide controversies and to enforce rights, the government must either perish by its own imbecility, or the other departments of government must usurp powers for the purpose of commanding obedience, to the destruction of liberty."[1]

There must be a judicial power to give effect to the will of the legislative power, and the want of this was among the vital defects of the original confederation of the states.[2] This power must be co-extensive with the legislative, and be capable of deciding every judicial question which grows out of the Constitution and laws.[3]

Where the Judicial Power is Vested.

§ 2. The Constitution declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[4]

It has been maintained with much ability that, under this provision, Congress had no discretion as to the creation or organization of a Supreme Court and of inferior courts; that the language was mandatory, and that Congress could not have refused to create these courts without a violation of its duty.[5] But it is unnecessary to discuss this question, as power was, by the Consti-

[1] Story on the Const. § 1574. See also 1 Kent Com. 294.

[2] The Federalist, Nos. 33, 39, 80; 1 Story on Const. 344–384.

[3] Cohens *v.* Virginia, 6 Wheat. 384.

[4] 1 Const. art. 3, § 1.

[5] Martin *v.* Hunter, 1 Wh. 304; The Moses Taylor, 4 Wall. 411; 1 Kent Com. 318.

tution, conferred on Congress for this purpose, and it has provided for the organization of a Supreme Court and of inferior courts.

The importance of limiting the court of final resort to one Supreme Court will be obvious. If there were more than one, a diversity of decisions might and probably would occur; and this diversity, relating not only to general principles of the municipal law, but to the interpretation of statutes and the Constitution, would lead to doubts, distrust and disputes, and subject the administration of justice by the federal courts to reproach and disgrace.

The Constitution left Congress to provide for the organization and constitution of the federal courts. It prescribes the extent of the judicial power of the United States, and expressly provides in what cases the Supreme Court shall have original jurisdiction, giving it appellate jurisdiction in other cases.

Extent of Judicial Power.

§ 3. On the subject of the extent of judicial power the Constitution provides: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens or subjects."[1]

Amendment Construing this Section.

§ 4. It may be proper here to refer to a controversy that arose soon after the ratification of the Constitution in 1787, as to the proper construction of a clause of the foregoing section. The

[1] Const. art. 3, § 2, ch. 1. The cases before the Supreme Court of the United States, in which this clause of the Constitution has been passed upon are quite numerous, but instead of citing them here they will be noted and to some extent discussed as the work progresses and the different features of the clause are considered.

question presented was, whether a state could be sued in a federal court by a citizen of another state. Congress had provided for the organization of the Supreme Court and district and circuit courts, and given them, respectively, jurisdiction in certain cases. It had long been a maxim of the law that a sovereign power could not be sued in its own courts except by its consent. On the other hand a government in its corporate capacity may sue like an individual, and the various states of the Union have authority to sue in the state and federal courts. In the case of Chisholm *v.* Georgia,[1] the Supreme Court held that the Constitution gave that court jurisdiction of a suit brought against a state by a citizen of another state. This interpretation of the Constitution, however, excited much opposition and dissatisfaction, and led to the adoption of an amendment which prohibited the construction which it had received by the Supreme Court.

The amendment is as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[2]

[1] 2 Dall. 419.

[2] Amend. Const. art. 11. In Chisholm *v.* Georgia, *supra*, Mr. Chief Justice Jay, who gave the opinion of the court in the case, in construing the constitutional provision, made a distinction between a suit against a state and one against the United States, holding that the former might be sued by a citizen of another state, but not the latter. He said: "In all cases of actions against states or individual citizens the national courts are supported in all their legal and constitutional proceedings and judgments by the arm of the executive powers of the United States. But in cases of actions against the United States there is no power which the courts can call to their aid. From this distinction important conclusions are deducible; and they place the case of a state and the case of the United States in a very different view."

Among the lucid expositions of the various provisions of the Constitution contemporary with the origin of that instrument contained in The Federalist we find some considerations of this subject in No. 81, now credited to Alexander Hamilton. He says: "It has been suggested that an assignment of public securities of one state to the citizens of another would enable them to prosecute that state in the federal courts for the amount of those securities—a suggestion which the following considerations prove to be without foundation. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exception as one of the attributes of sovereignty, is

Whatever may have been the true construction of this clause of the Constitution, it is now settled by this mandatory amendment.

now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty were discussed in considering the article on taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from any constraint but that which flows from the obligations of good faith.

"The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will.

"To what purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting state; and to ascribe to the federal courts, by mere implication and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarranted."

It would appear from this that the opinion of the court in Chisholm *v.* Georgia differed from that of Mr. Hamilton at the time he was urging the adoption of the Constitution. It is evident that some of his conclusions were erroneous, as suggested by the question, "How could recoveries be enforced?" It might be replied, as we enforce judgment against ordinary municipal corporations, backed by the executive power of the United States. See Story on Const. § 1, 678.

In Hans *v.* Louisiana, 134 U. S. 1, it was held that a state cannot be sued in a circuit court of the United States by one of its own citizens upon the ground that the case is one that arises under the Constitution or laws of the United States. Chisholm *v.* Georgia was questioned by a majority of the court, through Mr. Justice Bradley in a very interesting opinion; but Mr. Justice Harlan dissented, because the comments on that case were not necessary to the decision of the case then before the court, and besides, the decision in Chisholm *v.* Georgia was based upon a sound interpretation of the Constitution as that instrument then was.

The Supreme Court has no original jurisdiction of a suit between a state on the one side and citizens of another state and citizens of the same state on the other side. California *v.* South. Pac. Co., 157 U. S. 229.

In 1865 Congress constituted a Court of Claims, with jurisdiction to hear and determine all claims founded on any law of Congress, or upon any regulation of an executive department, or upon any contract express or implied with the government of the United States, and all claims which may be referred to it by either house of Congress, which may be suggested to it by petition filed therein. See Rev. Stat. ch. 21.

Summary of reasons on which the judicial power rests.

§ 5. Before proceeding to the consideration of the organization and jurisdiction of the federal courts we will notice that brief summary of reasons on which each of the enumerated judicial powers of the Constitution rests, as set forth in the opinion of Mr. Chief Justice Jay in the case of Chisholm *v.* Georgia, *supra.* He said: "It may be asked what is the precise sense and latitude in which the words 'to establish justice,' as here used [in the preamble of the Constitution], are to be understood? The answer to this question will result from the provisions made in the Constitution on this head. They are specified in the second section of the third article, where it is ordained that the judicial power of the United States shall extend to ten descriptions of cases, namely: 1. To all cases arising under this Constitution; because the meaning, construction and operation of a compact ought always to be ascertained by all the parties, not by authority derived from only one of them. 2. To all cases arising under the laws of the United States; because, as such laws, constitutionally made, are obligatory on each state, the measure of the obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3. To all cases arising under treaties made by their authority; because, as treaties are compacts made by and obligatory on the whole nation, their operation ought not to be affected or regulated by local laws or courts of a part of the nation. 4. To all cases affecting ambassadors, or other public ministers and consuls; because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5. To all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose rights and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction. 6. To controversies to which the United States shall be a party; because, in cases in which the whole people are interested, it would not be equal or wise to let any one state decide and measure out justice due to others. 7. To controversies between two or more states; because domestic tranquillity requires that the contentions of

states should be peaceably terminated by a common judicatory; and because in a free country justice ought not to depend on the will of either of the litigants. 8. To controversies between a state and citizens of another state; because, in case a state (that is, all the citizens of it) has demands against some citizens of another state, it is better that she should prosecute her demands in a national court than in a court of the state to which those citizens belong, the danger of irritations and criminations arising from apprehensions and suspicions of partiality being thereby obviated; because, in cases where some citizens of one state have demands against all the citizens of another state, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due the former; and true republican government requires that free and equal citizens should have free, fair and equal justice. 9. To controversies between citizens of the same state claiming lands under grants of different states; because, as the rights of the two states to grant the land are drawn into question, neither of the two states ought to decide the controversy. 10. To controversies between a state, or the citizens thereof, and foreign states, citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations or people ought to be ascertained by, and depend on, national authority. Even this cursory view of the judicial powers of the United States leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty and the equal rights of the people."

The profound wisdom which dictated these provisions of the Constitution is manifest from the clear outline and condensed statement of the grounds on which they rest, and the experience of a century has fully confirmed the views of its earlier expounders.

Jurisdiction of the Supreme Court.

§ 6. The original as well as the appellate jurisdiction of the Supreme Court is fixed by the Constitution. It provides that in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction.[1] In all the other cases

[1] The Supreme Court has original jurisdiction of a suit brought by the United States against a state to determine the boundary between that

before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.[1]

It is manifest that the Supreme Court cannot lawfully exercise original jurisdiction except in the enumerated cases, and that no act of Congress could give it any additional jurisdiction, or take from it any of the judicial powers conferred upon it by this provision of the Constitution.[2]

The Original Jurisdiction of the Supreme Court not Exclusive.

§ 7. It has been a question of considerable controversy whether the grant of original jurisdiction to the Supreme Court in the specific cases mentioned in the Constitution was designed to make this jurisdiction exclusive; whether it should be construed to give it jurisdiction in such cases, exclusively of other federal courts which might be, and have since been, erected and organized under acts of Congress, in pursuance of the authority given by the Constitution for this purpose. This question has never been authoritatively settled by the Supreme Court; for, although in

state and a territory; such a suit is properly brought in equity and not at law. United States *v.* Texas, 143 U. S. 621. In determining the boundary lines between states the Supreme Court will proceed with the greatest caution and deliberation and no order can stand unless a full opportunity to be heard has been granted. Iowa *v.* Illinois, 151 id. 238.

[1] Art. 3, sec. 2, Const. U. S.

[2] Marbury *v.* Madison, 1 Cr. 137; (1801) Wiscart *v.* Dauchy, 3 Dall. 321; 1 Kent. Com., sec. 15, p. 314, *et seq.; Ex parte* Vallandingham, 1 Wall. 248; *Ex parte* Yerger, 8 Wall. 85; The Alicia, 7 Wall. 571; Kentucky *v.* Dennison, 24 How. 66.

Under this provision of the Constitution original jurisdiction in the Supreme Court to settle boundaries between states has been recognized ever since the decision in Rhode Island *v.* Massachusetts, 12 Pet. 657; and that court through Mr. Justice Harlan, maintained jurisdiction of a suit between the United States and the State of Texas to settle their claims to Greer county in that state, instituted by the attorney general under an act of Congress directing the bringing of the suit: U. S. *v.* Texas, 143 U. S. 621. The Chief Justice and Mr. Justice Lamar dissented, holding: "The original jurisdiction which depends solely upon the character of the parties is confined to the cases enumerated, in which a state may be a party, and this is not one of them," and "The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the contrary here the United States is a party."

the case of United States *v.* Ravara,[1] commenced in the circuit court for the district of Pennsylvania, it was held that Congress could give other federal courts concurrent jurisdiction in such cases, the opinion of the Supreme Court in the subsequent case of Marbury *v.* Madison[2] would appear to be in conflict with this doctrine; and in the still later case of United States *v.* Ortega,[3] the question was involved in the record, but the court did not find it necessary to decide it.

It has, however, been maintained by jurists of great eminence and ability that it is not essential to construe this provision of the Constitution as giving the Supreme Court exclusive original jurisdiction in the cases specified, and that there is nothing in it inconsistent with the power of Congress to create inferior courts and confer upon them original jurisdiction concurrent with the Supreme Court, in the same specific cases; and this construction was ably maintained by Mr. Justice Nelson, in Graham *v.* Stucken.[4]

The judicial powers of the United States, as we have seen, were vested in the Supreme Court, and in such inferior courts as Congress should establish. When inferior courts were first organized and established, as they were by the Judiciary Act of 1789, Congress gave the circuit and district courts jurisdiction of certain causes of which the Supreme Court also had jurisdiction, by virtue of the provisions of the Constitution. The provisions of this act have remained unchanged in this respect, and were incorporated into the Revised Statutes.[5]

This practical contemporaneous exposition and legislative interpretation of the Constitution by Congress, some of whose members were especially interested in framing the Judiciary Act and had been members of the convention that framed the Constitution, and the long acquiescence in and tacit recognition of this interpretation by the courts, both state and federal, and by Congress, is certainly quite satisfactory if not conclusive on this question. In support of this view, Mr. Justice Nelson, in Graham *v.* Stucken, *supra*, says: "The last clause of section 2, arti-

[1] 2 Dall. 297.

[2] 1 Cr. 137.

[3] 11 Wh. 467.

[4] 4 Blatch. 50. See also St. Luke's Hospital *v.* Barclay, 3 Id. 259; Story on Constitution, § 1705; 1 Kent Com. 315.

[5] Stat. L. 78; Rev. Stat. §§ 629, 687; Act of March 3, 1875, ch. 137, 18 Stat. L. 470.

cle 3, of the Constitution declares that in all cases affecting ambassadors, and other public minister and consuls, and in those in which a state shall be a party, the Supreme Court shall have original jurisdiction. Congress, in distributing and regulating this grant of jurisdiction, provided, in section 13 of the Judiciary Act, that the Supreme Court should have exclusive jurisdiction in all cases against ambassadors, etc.; and original, but not exclusive, jurisdiction in all cases 'in which a consul or vice-consul shall be a party,' thus clearly rejecting the idea that the grant in the Constitution in respect to consuls was exclusively to the Supreme Court."

In Ames *v.* Kansas,[1] Waite, C. J., said: "We are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction." And in U. S. *v.* Louisiana,[2] Field, J., said: "In Ames *v.* Kansas the question was very fully examined and the conclusion reached that the original jurisdiction of the Supreme Court in cases where a state is a party is not made exclusive by the Constitution and that it is competent for Congress to authorize suits by a state to be brought in the inferior courts of the United States."

In view of these decisions it may be affirmed that Congress has the power to confer on any or all of the inferior courts of the United States, which she has constituted or may hereafter constitute, original jurisdiction in any or all of the class of cases in which the Constitution has also conferred original jurisdiction on the Supreme Court.

[1] 111 U. S. 449. [2] 123 U. S. 32.

CHAPTER II.

CONSTITUTION AND ORGANIZATION OF FEDERAL COURTS.

Duty of Congress to Provide for.

§ 8. The Constitution vested the judicial power of the United States in one Supreme Court and such inferior courts as Congress might from time to time constitute. It was further provided by the Constitution that the President "shall nominate and, by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court;"[1] and that "the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."[2]

It was the manifest duty of Congress, under the circumstances, to provide for the organization of a Supreme Court and inferior courts of the United States.

In pursuance of this plain duty Congress did, by the act of September 24, 1789, divide the United States into judicial districts and provide for the organization of the Supreme Court and district and circuit courts, and their jurisdiction, the number of justices of the Supreme Court, their precedence and salaries, and the appointment of clerks and marshals. Some changes have necessarily been made in this organic act, but its provisions remain substantially the same in the Revised Statutes, which, with the amendments thereof, divide the United States into districts as follows:

Judicial Districts.

§ 9. The United States is divided into judicial districts as follows:[3]

STATES CONSTITUTING ONE DISTRICT.[4]—The Territory of Alaska[5]

[1] Const. art. 2, § 2.
[2] Const. art. 3, § 1.
[3] Rev. Stat., § 530.
[4] Rev. Stat. § 531, as amended by Act of June 26, 1876; 19 Stat. L. 61.
[5] Act of May 17, 1884, 23 Stat. L. 24: 1 Supp. R. S. 430.

and the States of Colorado, Connecticut, Delaware, Idaho,[1] Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota,[2] Oregon, Rhode Island, South Dakota,[3] Utah,[4] Vermont, Washington, West Virginia and Wyoming,[5] each, constitute one judicial district.

Alabama.—The state is divided into three districts, the southern, middle and northern.[6]

The SOUTHERN DISTRICT includes the counties of Baldwin, Choctaw, Clarke, Conecuh, Escambia, Marengo, Mobile, Monroe, Washington and Wilcox.

The MIDDLE DISTRICT includes the counties of Autauga, Barbour, Bullock, Butler, Chilton, Chambers, Clay, Coffee, Coosa, Covington, Crenshaw, Dale, Dallas, Elmore, Geneva, Henry, Lee, Lowndes, Macon, Montgomery, Perry, Pike, Randolph, Russell and Tallapoosa.

The NORTHERN DISTRICT is divided into two divisions.

Northern Division.—Colbert, Cullman, Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison, Marion, Marshall, Morgan and Winston.

Southern Division.—Bibb, Blount, Calhoun, Cherokee, Cleburne, De Kalb, Etowah, Fayette, Greene, Hale, Jefferson, Lamar, Pickens, St. Clair, Shelby, Sumter, Talladega, Tuscaloosa and Walker.

Arizona.—The territory is divided into four districts.

FIRST DISTRICT.—Cochise and Pima.

SECOND DISTRICT.—Pinal, Gila and Graham.

THIRD DISTRICT.—Maricopa and Yuma.

FOURTH DISTRICT.—Yavapai, Apache, Coconino and Mohave.[7]

[1] Act of July 3, 1890, 26 Stat. L. 215: 1 Supp. R. S. 767.

[2] Act of Feb'y 22, 1889, 25 Stat L. 676: 1 Supp. R. S. 645.

[3] Act of Feb'y 22, 1889: 1 Supp. R. S. 645.

[4] Act of July 16, 1894, 28 Stat. L. 107: 2 Supp. R. S. 197.

[5] Act of July 10, 1890, 26 Stat. L. 222: 1 Supp. R. S. 768. The Yellowstone National Park is part of the district of Wyoming. Act of May 7, 1894: 2 Supp. R. S. 183.

[6] Rev. Stat. § 532: Act of May 2, 1884, 23 Stat. L. 18.

[7] Act of Feb'y 11, 1891, 26 Stat L. 747: 1 Supp. R. S. 893.

Arkansas.[1]—The state is divided into two districts, the eastern and the western.

The WESTERN DISTRICT includes the counties of Benton, Washington, Carroll, Boone, Madison, Newton, Crawford, Franklin, Johnson, Logan, Sebastian, Scott, Yell, Polk, Sevier, Howard, Pike, Little River, Hempstead, Miller, Lafayette, Nevada, Columbia, Union, Ouachita and Calhoun.

It is divided into two divisions, the Texarkana and Fort Smith divisions.

Texarkana Division.—Sevier, Howard, Pike, Little River, Hempstead, Miller, Lafayette, Columbia, Nevada, Ouachita, Calhoun and Union.

Fort Smith Division.—The remaining counties of the western district.

The EASTERN DISTRICT includes the residue of the state. It is divided into three divisions, the eastern, northern and western divisions.

Eastern Division.—Mississippi, Crittenden, Lee, Phillips, Clay, Craighead, Poinsett, Greene, Cross, Saint Francis and Monroe.

Northern Division.— Independence, Cleburne, Stone, Izard, Baxter, Searcy, Marion, Sharp, Fulton, Randolph, Lawrence and Jackson.

Western Division.—The remaining counties of the eastern district.

California.—The state is divided into two districts.

The SOUTHERN, composed of the counties of San Luis Obispo, Fresno, Tulare, Kern, Santa Barbara, Ventura,

[1] Act of Feb'y 20, 1897, 29 Stat. L. 590: 2 Supp. R. S. 558. All crimes or offences hereafter committed in any of the divisions of the said district shall be cognizable within such division, and all prosecutions for crimes or offences heretofore committed in the district as heretofore constituted shall be commenced and proceeded with as if this act had not been passed.—*Ibid.* The Indian Territory, formerly part of the western district of Arkansas, was erected into a separate district by Act of Mar. 1, 1889, 25 Stat. L. 783: 1 Supp. R. S. 670. After September 1, 1896, the district court of Indian Territory was given exclusive jurisdiction of all offences committed in the territory. Act of Mar. 1, 1895, 28 Stat. L. 693: 2 Supp. R. S. 396. For previous acts relating to judicial districts in Arkansas see 2 Supp. R. S. p. 2 *notes*.

Los Angeles, San Bernardino, San Diego, Orange, Riverside, Madera and King; and the NORTHERN, composed of the remaining counties of the state.[1]

Florida.—The state of Florida is divided into two judicial districts, the northern and southern.

The SOUTHERN DISTRICT embraces the counties of Monroe, Manattee, Lee, De Soto, Hillsboro, Hernando, Polk, Pasco, Citrus, Alachua, Baker, Bradford, Brevard, Clay, Columbia, Dade, Duval, Hamilton, Lake, Madison, Marion, Nassau, Orange, Osceola, Putnam, Saint Johns, Sumter, Suwannee, and Volusia; and all the territory within the remaining counties constitutes the NORTHERN DISTRICT.[2]

Georgia.—The state is divided into two districts, the northern and southern.

The NORTHERN DISTRICT is divided into two divisions:[3]

Eastern Division.—Banks, Bartow, Campbell, Clarke, Clayton, Chattooga, Carroll, Cobb, Coweta, Catoosa, Cherokee, Dade, Dekalb, Douglas, Dawson, Elbert, Fannin, Fayette, Franklin, Floyd, Fulton, Forsyth, Gordon, Greene, Gilmer, Gwinnett, Habersham, Hall, Hart, Haralson, Henry, Jackson, Lumpkin, Morgan, Milton, Madison, Murray, Newton, Oglethorpe, Oconee, Paulding, Pickens, Polk, Rabun, Rockdale, Spalding, Towns, Union, Walker, Walton, Whitfield, and White.

Western Division.—Chattahoochee, Clay, Early, Harris, Heard, Meriwether, Marion, Miller, Muscogee, Quitman, Randolph, Schley, Stewart, Talbot, Taylor, Terrell, Troup, and Webster.

The SOUTHERN DISTRICT is divided into three divisions, called the eastern, western and northeastern divisions of the southern district of Georgia:

Eastern Division.—Appling, Berrien, Bulloch, Bryan,

[1] Act of August 5, 1886, 24 Stat. L. 308. Formerly the entire state constituted a single district. Rev. Stat. § 531.

[2] Rev. Stat. § 534: Act of Feb. 3, 1879, 10 Stat. L. 280: 1 Supp. R. S. 214.

[3] Western Division established by Act of Mch. 3, 1891, 26 Stat. L. 1110; 1 Supp. R. S. 954.

Brooks, Clinch, Camden, Coffee, Charlton, Colquitt, Chatham, Decatur, Echols, Emanuel, Effingham, Glynn, Irwin, Lowndes, Liberty, Montgomery, McIntosh, Pierce, Screven, Tattnall, Thomas, Ware, Wayne, and Worth.

Western Division.—Baker, Baldwin, Bibb, Butts, Calhoun, Crawford, Dodge, Dooley, Dougherty, Hancock, Houston, Jasper, Jones, Laurens, Lee, Macon, Mitchell, Monroe, Pike, Pulaski, Putnam, Sumter, Telfair, Twiggs, Upson, Wilcox, and Wilkinson.

Northeastern Division.—Burke, Columbia, Glascock, Jefferson, Johnson, Lincoln, McDuffie, Richmond, Taliaferro, Washington, Wilkes, and Warren.[1]

Idaho.—The state constitutes one judicial district. It is divided into three divisions:

Northern Division.—Latah, Nez Perce, Idaho, Shoshone, and Kootenai.

Central Division.—Ada, Alturas, Boise, Canyon, Elmore, Logan, Owyhee, and Washington.

Southern Division.—Bear Lake, Bingham, Bannock, Cassia, Custer, Fremont, Lemhi, and Oneida.[2]

Illinois.—The state is divided into two districts, the northern and southern.

The NORTHERN DISTRICT is divided into two divisions:

Northern Division.—Boone, Bureau, Carroll, Cook, DeKalb, Du Page, Grundy, Jo Daviess, Kane, Kankakee, Kendall, Lake, La Salle, Lee, McHenry, Ogle, Stephenson, Whiteside, Will, and Winnebago.

Southern Division.—Fulton, Henderson, Henry, Iroquois, Knox, Livingston, Marshall, McDonough, Mercer, Peoria, Putnam, Rock Island, Stark, Tazewell, Warren, and Woodford.

The SOUTHERN DISTRICT includes the residue of the state.[3]

[1] Rev. Stat., § 535, Act of Jan. 29, 1880, 21 Stat. L. 63; 1 Supp. R. S. 276. Act of Feb. 15, 1889, 25 Stat. L. 671; 1 Supp. R. S. 643.

[2] Act of July 3, 1890, 26 Stat. L. 215; 1 Supp. R. S. 767. Act of July 5, 1892, 27 Stat. L. 72; 2 Supp. R. S. 28.

[3] Rev. Stat. § 536, Act of Mch. 2, 1887, 24 Stat. L. 442; 1 Supp. R. S. 552.

Indian Territory.—The Territory is divided into three districts, known as northern, central, and southern districts.

The NORTHERN DISTRICT consists of all the Creek country, all of the Seminole country, all of the Cherokee country, all of the country occupied by the Indian tribes in the Quapaw Indian Agency, and the town site of the Miami Townsite Company.

The CENTRAL DISTRICT consists of all the Choctaw country.

The SOUTHERN DISTRICT consists of all the Chickasaw country.[1]

Iowa.—The state is divided into two districts, the northern and the southern.

The NORTHERN DISTRICT consists of four divisions, as follows:

Eastern Division.—Allamakee, Dubuque, Buchanan, Clayton, Delaware, Fayette, Winneshiek, Howard, Chickasaw, Bremer, Black Hawk, Floyd, and Mitchell.

Cedar Rapids Division.—Jones, Cedar, Linn, Johnson, Iowa, Benton, Tama, Grundy, Hardin, and Clinton.

Central Division.—Emmet, Palo Alto, Pocahontas, Calhoun, Kossuth, Humboldt, Webster, Winnebago, Hancock, Wright, Hamilton, Worth, Cerro Gordo, Franklin, and Butler.

Western Division.—Dickinson, Clay, Buena Vista, Sac, Osceola, O'Brien, Cherokee, Ida, Lyon, Sioux, Plymouth, Woodbury, and Monona.

The SOUTHERN DISTRICT consists of three divisions:

Eastern Division.—Scott, Cedar, Muscatine, Washington, Louisa, Keokuk, Appanoose, Davis, Wapello, Jefferson, Van Buren, Henry, Des Moines, and Lee.

Central Division.—Johnson, Iowa, Poweshiek, Mahaska, Jasper, Tama, Marshall, Story, Boone, Greene, Guthrie, Adair, Dallas, Polk, Madison, Warren, Marion, Clark, Lucas, Decatur, Wayne, and Monroe.

[1] Act of Mch. 1, 1895, 28 Stat. L. 693; 2 Supp. R. S. 392. The Indian Territory was made a separate district by Act of Mch. 1, 1889, 25 Stat. L. 783; 1 Supp. R. S. 670. Oklahoma Territory was created out of Indian Territory by Act of May 2, 1890; 26 Stat. L. 81; 1 Supp. R. S. 720.

Western Division.—Carroll, Crawford, Harrison, Shelby, Audubon, Cass, Pottawatomie, Mills, Montgomery, Adams, Union, Ringgold, Taylor, Page, and Fremont.[1]

Kansas.—The state constitutes one district, divided into three divisions, as follows:

First Division.—Entire state, except counties in second and third divisions.

Second Division.—Cowley, Butler, Harvey, Rice, McPherson, Ellsworth, Barton, Rush, Ness, Lane, Scott, Wichita, Greeley, Hamilton, Kearney, Finney, Garfield, Hodgman, Pawnee, Stafford, Reno, Kingman, Pratt, Kiowa, Edwards, Ford, Gray, Haskell, Grant, Stanton, Morton, Sedgwick, Stevens, Seward, Meade, Clark, Comanche, Harper, Barber, and Sumner.

Third Division.—Miami, Linn, Bourbon, Crawford, Cherokee, Labette, Neosho, Allen, Anderson, Coffey, Woodson, Wilson, Montgomery, Chautauqua, Elk, and Greenwood.[2]

Louisiana.—The state is divided into two districts, eastern and western.

The WESTERN DISTRICT includes the parishes of Caddo, Bossier, Webster, Claiborne, Union, Morehouse, West Carroll, East Carroll, Madison, Richland, Ouachita, Lincoln, Bienville, Red River, De Soto, Sabine, Winn, Natchitoches, Jackson, Caldwell, Franklin, Tensas, Concordia, Catahoula, Grant, Vernon, Rapides, Avoyelles, Saint Landry, Lafayette, Saint Martin's, Vermillion, Cameron, and Calcasieu. All process from the circuit and district courts of the western district against defendants residing in the parishes of Saint Landry, Saint Martin's, Cameron, Calcasieu, Lafayette, and Vermillion, are returnable to Opelousas. All process from said

[1] Act of July 20, 1882, 22 Stat. L. 172; 1 Supp. R. S. 358. Act of Feb. 24, 1891, 26 Stat. L. 767; 1 Supp. R. S. 895.

[2] Act of June 9, 1890, 26 Stat. L. 129; 1 Supp. R. S. 744. Act of May 3, 1892, 27 Stat. L. 24; 2 Supp. R. S. 12.

courts against defendants residing in the parishes of Rapides, Vernon, Avoyelles, Catahoula, Grant, and Winn, are returnable to Alexandria. All process from said courts against defendants residing in the parishes of Caddo, De Soto, Bossier, Webster, Claiborne, Bienville, Natchitoches, Red River, and Sabine, are returnable at Shreveport. All process from said courts against defendants residing in the parishes of Ouachita, Franklin, Richland, Morehouse, East Carroll, West Carroll, Madison, Tensas, Concordia, Union, Caldwell, Jackson, and Lincoln are returnable at Monroe.

The EASTERN DISTRICT includes the remaining parishes in the state. All process from the circuit and district courts for the eastern district against defendants residing in the parishes of Pointe Coupee, West Baton Rouge, Iberville, Ascension, East Feliciana, West Feliciana, East Baton Rouge, Saint Helena, and Livingston are returnable at Baton Rouge. All process against defendants residing in the other parishes of the eastern district are returnable at New Orleans.[1]

Michigan.—The state is divided into two districts, the eastern and western.

The WESTERN DISTRICT includes the territory and waters within the following boundaries, as they existed February 24, 1863, namely: commencing at the southwest corner of Branch County, in said state, and running thence north, on the west line of Branch and Calhoun Counties, to the south line of Barry County; thence east, on the north line of Calhoun and Jackson Counties, to the southeast corner of Eaton County; thence north, on the east boundary of Eaton County, to the south line of Clinton County; thence west, on the south boundary of said county, to the southwest corner thereof; thence

[1] Act of Mch. 3, 1881, 21 Stat. L. 606. Act of Aug. 13, 1888, 25 Stat. L. 507; 1 Supp. R. S. 325. Act of Aug. 8, 1888, 25 Stat. L. 388; 1 Supp. R. S. 438; 1 Supp. R. S. 615.

north, on the west boundary of Clinton and Gratiot Counties, to the south boundary of Isabella County; thence west, on its south boundary, to the southwest corner of said last-named county; thence north, on the west line of Isabella and Clare Counties, to the south boundary of Missaukee County; thence east, on its south boundary, to the southeast corner of Missaukee County; thence north, on the east line of Missaukee, Kalcasca and Antrim Counties, to the south boundary of Emmett County; thence east, to the southeast corner of Emmett County; thence north, on the east boundary of Emmett County, to the Straits of Mackinac; thence north, to midway across said straits; thence westerly, in a direct line, to a point on the shore of Lake Michigan where the north boundary of Delta County reaches Lake Michigan; thence west, on the north line of Delta County, to the northwest corner of said Delta County; thence south, on the west boundary of said county, to the dividing-line between the states of Michigan and Wisconsin, in Green Bay; thence northeasterly, on said dividing-line, into Lake Michigan; and thence southerly, through Lake Michigan, to the southwest corner of the state of Michigan, on a line that will include within said boundaries the waters of Lake Michigan within the admiralty jurisdiction of the state of Michigan; thence east, on the south boundary of the state of Michigan, to the intersection of the west line of Hillsdale County.[1]

The counties of Chippewa, Schoolcraft, Marquette, Houghton, Keweenaw, Ontonagon, Isle Royale, Baraga, and Mackinaw, being and including all that portion of the territory and waters of the eastern district lying in the upper peninsula of Michigan, were detached from the eastern and attached to the western district.[2]

The western district consists of two divisions, the

[1] Rev. Stat. § 538.

[2] Act of June 19, 1878, 20 Stat. L. 175; 1 Supp. R. S. 198.

southern and northern. The *southern division* comprises all that portion of the district lying and being in the lower peninsula of the state, and the *northern division* comprises all the territory and waters of the entire upper peninsula of the state.[1]

The EASTERN DISTRICT includes all the remaining territory and waters of the state. It is divided into two divisions:

Southern Division.—Branch, Calhoun, Clinton, Hillsdale, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Sanilac, Washtenaw, and Wayne.

Northern Division.—Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Shiawassee, and Tuscola.[2]

Minnesota.—The state constitutes one district, divided into six divisions, as follows:

First Division.—Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore, and Houston.

Second Division.—Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Le Sueur, Nicollet, Brown, Redwood, Lyon, Lincoln, Yellow Medicine, Sibley, and Lacqui-parle.

Third Division.—Chisago, Washington, Ramsey, Dakota, Goodhue, Rice, and Scott.

Fourth Division.—Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne, and Isanti.

Fifth Division.—Cook, Lake, St. Louis, Itasca, Cass, Crow, Wing, Aitkin, Carlton, Pine, Kanabec, Mille Lacs, Morrison, and Benton.

Sixth Division.—Stearns, Pope, Stevens, Big Stone, Traverse, Grant, Douglas, Todd, Otter Tail, Wilkins, Clay, Berker, Wadena, Norman, Polk, Marshall, Kittson, Beltrami, and Hubbard.[3]

[1] Act of June 19, 1878, 20 Stat. L. 67; 1 Supp. R. S. 181.

[2] Act of April 30, 1894, 28 Stat. L. 72; 1 Supp. R. S. 718.

[3] Act of April 26, 1890, 26 Stat. L. 175; 1 Supp. R. S. 198.

Mississippi.—The state is divided into two districts, the northern and southern.

The NORTHERN DISTRICT is divided into two divisions:

Eastern Division.—Counties of Tishamingo, Alcorn, Prentiss, Itawamba, Lee, Pontotoc, Monroe, Chickasaw, Clay, Oktibbeha, Lowndes, Winston, Choctaw, and Attala, as they existed June 15, 1882.

Western Division.—Counties of Carroll, Coahoma, Tunica, De Soto, Tate, Marshall, Panola, Benton, Tippah, Montgomery, Grenada, Tallahatchee, La Fayette, Union, Webster, Calhoun, Quitman, and Yalabusha, as they existed June 15, 1882.

The SOUTHERN DISTRICT is divided into three divisions:

Western Division.—Counties of Washington, Sharkey, Inaquena, Warren, Bolivar, and Sunflower.

Southern Division.—Counties of Hancock, Harrison, Jackson, Marion, Perry, and Green.

Eastern Division.—Counties of Lauderdale, Kemper, Noxubee, Leake, Neshoba, Newton, Jasper, Clarke, Wayne, and Jones.[1]

Missouri.—The state is divided into two districts, eastern and western.

The EASTERN DISTRICT is divided into two divisions, as follows:

Eastern Division.—Audrain, Bollinger, Butler, Cape Girardeau, Carter, Crawford, Dent, Dunklin, Franklin, Gasconade, Iron, Jefferson, Lincoln, Madison, Mississippi, Montgomery, New Madrid, Oregon, Pemiscot, Perry, Reynolds, Ripley, St. Charles, St. Francois, Ste. Genevieve, St. Louis, Scott, Shannon, Stoddard, Warren, Washington, Wayne.

Northern Division.—Marion, Macon, Randolph, Monroe, Lewis, Schuyler, Scotland, Adair, Pike, Ralls, Knox, Shelby, Clark.

[1] Rev. Stat. § 539. Act of June 15, 1882, 22 Stat. L. 101; 1 Supp. R. S. 344. Act of July 8, 1886, 24 Stat. L. 127; 1 Supp. R. S. 500. Act of February 28, 1887, 24 Stat. L. 430; 1 Supp. R. S. 547. Act of April 4, 1888, 25 Stat. L. 78; 1 Supp. R. S. 583. Act of April 11, 1888, 25 Stat. L. 84; 1 Supp. R. S. 584. Act of July 18, 1894, 28 Stat. L. 114; 2 Supp. R. S. 202.

The WESTERN DISTRICT is divided into four divisions as follows:

Western Division.—Barton, Bates, Caldwell, Carroll, Cass, Chariton, Clay, Grundy, Henry, Jackson, Jasper, Johnson, Lafayette, Linn, Livingston, Mercer, Putnam, Ray, St. Clair, Saline, Sullivan, and Vernon.

St. Joseph Division.—Andrew, Atchison, Buchanan, Clinton, Daviess, Dekalb, Gentry, Harrison, Holt, Nodaway, Platte, and Worth.

Central Division.—Benton, Boone, Calloway, Camden, Cole, Cooper, Hickory, Howard, Maries, Miller, Moniteau, Morgan, Osage, Pettis, and Phelps.

Southern Division.—Barry, Christian, Cedar, Dade, Dallas, Douglas, Greene, Howell, Laclede, Lawrence, McDonald, Newton, Ozark, Polk, Pulaski, Stone, Taney, Texas, Webster, and Wright.[1]

Montana.—The state constitutes one judicial district. It consists of two divisions:

Northern Division.—Cascade, Choteau, Custer, Dawson, Deerlodge, Flathead, Fergus, Granite, Gallatin, Jefferson, Lewis and Clarke, Meagher, Missoula, Park, Ravalli, Teton, Yellowstone, and Valley.

Southern Division.—Beaverhead, Madison, and Silverbow.[2]

New Mexico.—The territory is divided into five districts:

FIRST DISTRICT.—Santa Fe, Taos, Rio Arriba, and San Juan.

SECOND DISTRICT.—Bernalillo and Valencia.

THIRD DISTRICT.—Donna Ana, Grant, and Sierra.

FOURTH DISTRICT.—San Miguel, Mora, Colfax, Union, and Guadaloupe.

FIFTH DISTRICT.—Socorro, Lincoln, Chaves, and Eddy.[3]

[1] Rev. Stat. § 540, Act of April 8, 1878, 20 Stat. L. 35; Act of Jan. 21, 1879, id. 263; Act of Feb. 28, 1887. 1 Supp. R. S. 543; Act of Oct. 1, 1888, 25 Stat. L. 498: 1 Supp. R. S. 622. Act of Jan. 28, 1897, 29 Stat. L. 502; 2 Supp. R. S. 544.

[2] Act of Feb. 22, 1889, 25 Stat. L. 676; 1 Supp. R. S. 645. Act of July 20, 1892, 27 Stat. L. 252; 2 Supp. R. S. 40.

[3] Act of July 10, 1890, 26 Stat. L. 226; 1 Supp. R. S. 771.

New York.—The state is divided into three districts, the northern, eastern and southern.

The NORTHERN DISTRICT includes the counties of Rensselaer, Albany, Schoharie and Delaware, with all the counties north and west of them.

The EASTERN DISTRICT includes the counties of Richmond, Kings, Queens and Suffolk, with the waters thereof.

The SOUTHERN DISTRICT includes the residue of the state, with the waters thereof.[1]

The district courts of the southern and eastern districts of New York have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens and Suffolk, and over all seizures made and all matters done in such waters; and all processes or orders issued out of either of said courts, or by any judge thereof, run and may be executed in any part of the said waters.[2]

North Carolina.—The state is divided into two districts, the eastern and western.

The WESTERN DISTRICT includes the counties of Mecklenburg, Cabarras, Stanly, Montgomery, Richmond, Davie, Davidson, Randolph, Guilford, Rockingham, Stokes, Forsyth, Union, Anson, Caswell, Person, Alamance, Orange, Chatham, Moore, Clay, Cherokee, Swain, Macon, Jackson, Graham, Haywood, Transylvania, Henderson, Buncombe, Madison, Yancey, Mitchell, Watauga, Ashe, Alleghany, Caldwell, Burke, McDowell, Rutherford, Polk, Cleveland, Gaston, Lincoln, Catawba, Alexander, Wilkes, Surry, Iredell, Yadkin and Rowan, and all territory embraced therein which may hereafter be erected into new counties.

The EASTERN DISTRICT includes the residue of the state.[3]

North Dakota.—The state constitutes one district and is divided into four divisions, as follows:

Southwestern.—Counties of Burleigh, Stutsman, Logan,

[1] Rev. Stat. § 541; Act of Feb. 18, 1875, 18 Stat. L. 316.

[2] Rev. Stat. § 542.

[3] Rev. Stat. § 543.

McIntosh, Emmons, Kidder, Foster, Wells, McLean, and all the territory lying south and west of the Missouri River.

Southeastern.—Counties of Cass, Richland, Barnes, Dickey, Sargent, La Moure, Ransom, Griggs and Steele.

Northeastern.—Grand Forks, Traill, Walsh, Pembina, Cavalier and Nelson.

Northwestern.—Ramsey, Eddy, Benson, Towner, Rolette, Bottineau, Pierce, McHenry, Ward and all the territory lying north of the southwestern division.[1]

Ohio.—The state is divided into two districts, the northern and southern.

The SOUTHERN DISTRICT includes the counties of Belmont, Guernsey, Muskingum, Licking, Franklin, Madison, Champaign, Shelby and Mercer, Union, Delaware, Morrow, Knox, Coshocton, Harrison and Jefferson, as they existed February 10, 1855, with all the counties south of them. It is divided into two divisions, the eastern and western.

Eastern Division.—Counties of Union, Delaware, Morrow, Knox, Coshocton, Harrison, Jefferson, Madison, Fayette, Franklin, Pickaway, Ross, Pike, Gallia, Jackson, Meigs, Vinton, Athens, Hocking, Fairfield, Licking, Perry, Muskingum, Morgan, Washington, Noble, Monroe, Belmont and Guernsey.

Western Division.—The remaining counties in the district.[2]

The NORTHERN DISTRICT includes the residue of the state.[3] It is divided into two divisions, the eastern and western.

Western Division.—Counties of Williams, Defiance, Paulding, Van Wert, Mercer, Auglaize, Allen, Putnam, Henry, Fulton, Lucas, Wood, Hancock,

[1] Act of April 26, 1890, 26 Stat L. 64; 1 Supp. R. S. 277.

[2] Act of Feb. 4, 1880, 21 Stat. L. 67; 1 Supp. R. S. 716.

[3] Rev. Stat. § 544, Act of Feb. 4, 1880, 21 Stat. L. 63.

Hardin, Logan, Union, Delaware, Marion, Wyandot, Seneca, Sandusky, Ottawa, Erie and Huron.

Eastern Division.—The remaining counties in the district.[1]

Oklahoma.—The territory is divided into five judicial districts:[2]

FIRST DISTRICT.—Logan, Lincoln and Payne.

SECOND DISTRICT.—Blaine, "D," Day, Roger Mills, "G," Washita, and Canadian.

THIRD DISTRICT.—Pottawatomie, Oklahoma, and Cleveland.

FOURTH DISTRICT.—"K," Beaver, "Q," and "P."

FIFTH DISTRICT.—"O," Kingfisher, "L," "M," and "N."

Pennsylvania.—The state is divided into two districts, the eastern and western.

The WESTERN DISTRICT includes the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Bradford, Butler, Cambria, Cameron, Center, Clarion, Clearfield, Clinton, Columbia, Crawford, Elk, Erie, Fayette, Forest, Fulton, Greene, Huntingdon, Indiana, Jefferson, Juniata, Lackawanna, Lawrence, Luzerne, Lycoming, McKean, Mercer, Mifflin, Montour, Northumberland, Potter, Snyder, Somerset, Sullivan, Susquehanna, Tioga, Union, Venango, Warren, Washington, Westmoreland, and Wyoming.

The EASTERN DISTRICT includes the counties of Adams, Berks, Bucks, Carbon, Chester, Cumberland, Dauphin, Delaware, Franklin, Lancaster, Lebanon, Lehigh, Monroe, Montgomery, Northampton, Perry, Philadelphia, Pike, Schuylkill, Wayne, and York.[3]

South Carolina.—The state is divided into two districts, the eastern and western.

The WESTERN DISTRICT includes the counties of Lancaster, Chester, York, Union, Spartansburgh, Greenville, Pendleton, Abbeville, Edgefield, Newberry, Laurens and Fairfield, as they existed Feb. 21, 1823.

The EASTERN DISTRICT includes the residue of the state.[4]

[1] Act of June 8, 1878, 20 Stat. L. 102; 1 Supp. R. S. 172.

[2] Greer County, Texas, is transferred to Oklahoma by Act of May 4, 1896; 29 Stat. L. 113; 2 Supp. R. S. 462.

[3] Rev. Stat. § 545.

[4] Rev. Stat. § 546.

South Dakota.—The state constitutes one judicial district divided into four divisions:

Southern Division.—Counties of Clay, Union, Yankton, Turner, Lincoln, Bonhomme, Charles Mix, Douglas, Hutchinson, Brule, Aurora, Davison, Hanson, McCook, Minnehaha, Moody Lake, Sanborn, Lyman, Miner, Gregory, Todd, Beadle and Kingsbury, Crow Creek and Lower Brule and the Yankton Indian reservation.

Northern Division.—Brookings, Hamlin, Deuel, Grant, Roberts, Codington, Clark, Day. Marshall, Spink, Brown, McPherson, Edmunds, Campbell, Wolworth and the Sisseton and Wahpton reservation.

Central Division.—Potter, Sully, Faulk, Hand, Hyde, Hughes, Buffalo, Jerauld, Stanley, Nowlin, and that portion of the counties of Pratt, Jackson and Sterling, not included in any Indian reservation, and the Standing Rock and Cheyenne Indian reservation.

Western Division.—All that portion of the state lying west of the central and southern divisions, and in addition thereto the Rosebud and Red Cloud Indian reservations.[1]

Tennessee.—The state is divided into three districts, the eastern western and middle:

The EASTERN DISTRICT includes the counties of Anderson, Bledsoe, Blount, Bradley, Campbell, Carter, Claiborne, Cocke, Cumberland, Grainger, Greene, Hamilton, Hancock, Hawkins, Jefferson, Johnson, Knox, McMinn, Marion, Meigs, Monroe, Morgan, Polk, Rhea, Roane, Scott, Sevier, Sullivan, Union, and Washington, as they existed February 19, 1856. It is divided into two divisions, the northern and southern.

Southern Division.—Counties of Hamilton, James, Polk, McMinn, Bradley, Meigs, Rhea, Marion, Sequatchie, Bledsoe, Grundy and Cumberland.

[1] Act of Nov. 3, 1893, 28 Stat. L. 5; 2 Supp. R. S. 151.

Northern Division.—The remaining counties in the district.[1]

The WESTERN DISTRICT includes the counties of Benton, Carroll, Henry, Obion, Perry, Dyer, Gibson, Lauderdale, Haywood, Tipton, Shelby, Fayette, Hardeman, McNairy, Hardin, Madison, Henderson and Weakley, as they existed June 18, 1838.[2] It is divided into two divisions, the eastern and western.

Eastern Division.—Counties of Benton, Carroll, Decatur, Gibson, Hardeman,[3] Henderson, Henry, Madison, McNairy, Hardin, Dyer, Lake, Crockett, Weakley and Obion.

Western Division.—The remaining counties in the district.[4]

The MIDDLE DISTRICT includes the residue of the state.[5]

Texas.—The state is divided into three districts, northern, eastern and western.[6]

NORTHERN DISTRICT :

Returnable to Waco.—Brazos, Robertson, Leon, Limestone, Freestone, McLennan, Falls, Bell, Coryell, Hamilton, Bosque, Somervell, and Hill.

Returnable to Dallas.—Navarro, Johnson, Ellis, Kaufman, Dallas, Rockwall, Hunt, Collin, Denton, Cooke, and Montague.

Returnable to Fort Worth.—Comanche, Hood, Erath, Tarrant, Parker, Palo Pinto, Wise, Clay, Jack,

[1] Act of June 11, 1880, 21 Stat. L. 175; 1 Supp. R. S. 295.

[2] Rev. Stat. § 547. Act of June 11, 1880, 21 Stat. L. 175; 1 Supp. R. S. 295. Act of March 3, 1875, 18 Stat. L. 480; 1 Supp. R. S. 90, repeated by Act of April 14, 1896; 29 Stat. L. 91; 2 Supp. R. S. 457, and Perry attached to western district.

[3] Act of Jan. 15, 1883, 22 Stat. L. 402; 1 Supp. R. S. 392.

[4] Act of June 20, 1878, 20 Stat. L. 235; 1 Supp. R. S. 201–2.

[5] Grundy was attached to middle district by Act of Dec. 27, 1884, 23 Stat. L. 280; 1 Supp. R. S. 471.

[6] Rev. Stat. § 548, Act of Feb. 24, 1879, 20 Stat L. 318; 1 Supp. R. S. 217. Act of June 11, 1879, 21 Stat. L. 10; 1 Supp. R. S. 265. Act of June 14, 1880, 21 Stat. L. 198; 1 Supp. R. S. 297. Act of Jan. 6, 1883, 1 Supp. R. S. 389.

Young, Archer, Wichita, Wilbarger, Baylor, Hardeman, Cottle, Motley, Briscoe, Hall, Childress, Collingsworth, Donley, Armstrong, Randall, Deaf Smith, Oldham, Potter, Carson, Gray, Wheeler, Hemphill, Lipscomb, Ochiltree, Roberts, Hutchinson, Hansford, Sherman, Moore, Hartley, and Dallam.

Returnable to Abilene.—Eastland, Stephens, Throckmorton, Shackelford, Callahan, Taylor, Jones, Haskell, Knox, Nolan, Fisher, Stonewall, Kent, Dickens, King, Crosby, Garza, Lubbock, Gaines, Andrews, Mitchell, Scurry, Borden, Howard, Martin, and Midland.

Returnable to San Angelo.—Glasscock, Sterling, Coke, Tom Green, Crockett, Schleicher, Sutton, Irion, Mills, Runnels, Coleman, and Brown.[1]

EASTERN DISTRICT:

Returnable to Galveston.—Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Madison, Matagorda, Montgomery, Tyler, Walker, Waller, Wharton, and Jackson.[2]

Returnable to Tyler.—Anderson, Angelina, Cherokee, Gregg, Henderson, Houston, Nacogdoches, Panola, Rains, Rusk, Shelby, Smith, Trinity, Van Zandt, and Wood.

Returnable to Beaumont.—Jefferson, Orange, Newton, Jasper, Hardin, Liberty, Tyler, San Augustine, Sabine, Polk and San Jacinto.[3]

Returnable to Jefferson.—Bowie, Camp, Cass, Franklin, Harrison, Hopkins, Marion, Morris, Titus, and Upshur.

[1] Act of June 11, 1896, 29 Stat. L. 456; 2 Supp. R. S. 527. Greer County was transferred to Oklahoma by Act of May 4, 1896, 29 Stat. L. 113; 2 Supp. R. S. 462. The grand jury sitting at any of the places for holding court, may present indictments for crimes committed at any place within the district. Logan *v.* U. S. 144, U. S. 263.

[2] Jackson transferred from western to eastern district by Act of June 11, 1879, 1 Supp. R S. 265.

[3] Act of Feb. 8, 1897, 29 Stat. L. 516; 2 Supp. R. S. 547.

Returnable to Paris.—Lamar, Fannin, Red River, Delta, and Grayson,[1] and all that part of the Indian Territory attached to the eastern judicial district of the State of Texas by the provisions of the act entitled "An act to establish a United States court in the Indian Territory, and for other purposes," approved March 1, 1889.[2]

WESTERN DISTRICT:

Returnable to San Antonio.—Aransas, Atascosa, Bandera, Bexar, Bee, Comal, Calhoun, Dewitt, Dimmit, Duval, Edwards, Encinal, Frio, Guadalupe, Gonzales, Goliad, Kerr, Kendall, Kinney, Karnes, Lasalle, Lavaca, Live Oak, Medina, Maverick, McMullen, Nueces, Refugio, San Patricio, Uvalde, Valverde, Victoria, Webb, Wilson, Zapata, and Zavalla.

Returnable to El Paso.—Andrews, Brewster, Buchel, Borden, Bailey, Crockett, Crane, Cochran, Crosby, Castro, Dawson, El Paso, Ector, Foley, Floyd, Glasscock, Gaines, Garza, Howard, Hockley, Hale, Jeff Davis, Loving, Lynn, Lubbock, Lamb, Midland, Martin, Mitchell, Presidio, Pecos, Palmer, Reeves, Sutton, Schleicher, Scurry, Swisher, Schumacher, Coke, and Brown.

Returnable to Brownsville.—Cameron, Hidalgo, and Starr.

Returnable to Austin.—Blanco, Bastrop, Burleson, Burnet, Caldwell, Concho, Fayette, Gillespie, Hays, Kimble, Lee, Llano, Mason, Menard, McCulloch, Milan, San Saba, Travis, Washington, and Williamson.

Utah.—The state constitutes one judicial district, divided into two divisions.

[1] Grayson transferred from northern to eastern district by Act of Dec. 11, 1890, 1 Supp. R. S. 885.

[2] By Act of Mar. 2, 1890, 1 Supp. R. S. 724, the jurisdiction of Texas courts over Oklahoma is taken away and their jurisdiction over certain offences in the Indian Territory is modified by grant of jurisdiction to U. S. courts therein.

Northern Division.—Weber, Davis, Morgan, Rich, Cache, and Boxelder.

Central Division.—Remaining counties of the state.[1]

Virginia.—The state is divided into two districts, the eastern and western.

The WESTERN DISTRICT includes the counties of Albemarle, Alleghany, Amhurst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Floyd, Franklin, Frederick Fluvanna, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Patrick, Page, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Smyth, Shenandoah, Tazewell, Washington, Wise, Wythe and Warren.

The EASTERN DISTRICT includes the residue of the state.[2]

Washington.—The state constitutes one judicial district divided into four divisions:

Northern Division.—King, Kitsap, Island, Whatcom, Skagit, Jefferson, Clallam, San Juan, and Snohomish.

Southern Division.—Wallawalla, Columbia, Garfield, Asotin, Whitman, Franklin, Yakima, and Klickitat.

Eastern Division.—Spokane, Stevens, Douglas, Okanogan, Kittitass, Lincoln, and Adams.

Western Division.—Pierce, Thurston, Mason, Chehalis,

[1] Act of March 2, 1897, 29 Stat. L. 620. All civil suits not of a local character which shall be brought in the district or circuit courts of the United States for the district of Utah, in either of said divisions, against a single defendant, or where all the defendants reside in the same division of said district shall be brought in the division in which the defendant or defendants reside, or if there are two or more defendants residing in different divisions, such suit may be brought in either division. All process issued in either division may be served and executed in either or both divisions. All issues of fact in civil causes triable in any of the said courts shall be tried in the division where the defendant or one of the defendants reside, unless by consent of both parties the case shall be removed to some other division. Ibid.

[2] Rev. Stat. § 549.

Lewis, Pacific, Wahkiakum, Cowlitz, Clarke, and Skamania.[1]

Wisconsin.—The state is divided into two districts, the eastern and western.

The WESTERN DISTRICT includes the counties of Rock, Jefferson, Dane, Green, Grant, Columbia, Iowa, La Fayette, Sauk, Richland, Crawford, Vernon, La Crosse, Monroe, Adams, Juneau, Buffalo, Chippewa, Dunn, Clarke, Jackson, Eau Claire, Pepin, Marathon, Wood, Pierce, Polk, Portage, Saint Croix, Trempealeau, Douglas, Barron, Burnett, Ashland and Bayfield.

The EASTERN DISTRICT includes the residue of the state.[2]

[1] Act of April 5, 1890, 1 Supp. R. S. 711.

[2] Rev. Stat. § 550.

CHAPTER III.

ORGANIZATION OF DISTRICT COURTS.

District Judges, Appointment and Residence.

§ 10. A district judge is appointed for each district,[1] with the following exceptions: In Alabama, there is one judge for the northern and middle districts and one for the southern district. In Mississippi there is but one district judge, and but one in South Carolina.[2] In Tennessee there is one judge for the middle and eastern districts and one for the western district.[3]

Every judge of the district court must reside in the district for which he is appointed, or in cases where he is appointed for more than one district, in one of such districts.[4]

SALARIES OF DISTRICT JUDGES.—The salaries of the several judges of the District Courts are at the rate of $5000 per annum.[5]

Salary of Judges.

§ 11. The Constitution provides that the judges shall hold their offices during good behavior, and that they shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.[6] And the statutes provide that when any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall during the residue of his natural life receive the

[1] Rev. Stat. § 551. The Act of April 25, 1882, 22 Stat. L., 47; 1 Supp. R. S. 336, amends Rev. Stat. § 552, and provides that there shall be one judge for each district in Georgia. The Act of June 26, 1876, 19 Stat. L. 61; 1 Supp. R. S. 106, authorizes the appointment of a district judge for Colorado.

[2] Rev. Stat. § 552.

[3] Act of June 14, 1878, 20 Stat L. 132; 1 Supp. R. S. 181.

[4] Rev. Stat. § 551, 552. The judge for the southern district of Florida was required by Rev. Stat. § 553, to reside at Key West, but this was repealed by Act of March 13, 1896, 29 Stat. L. 55.

[5] Act of Feb. 24, 1891, 26 Stat. L. 783; 1 Supp. R. S. 896.

[6] Const., art. 3, § 1.

same salary which was by law payable to him at the time of his resignation.[1]

Judges Prohibited from Practising Law.

§ 12. Another wise provision of the statutes prohibits any federal judge from exercising the profession or employment of counsel or attorney, or engaging in the practice of the law, making the offender guilty of a high misdemeanor.[2]

Clerks: Appointment of; Official Bonds.

§ 13. The judges of the several districts have the power, and it is their duty, to appoint a clerk in each district, except where otherwise provided by statute;[3] and the statute provides that in some districts they may appoint more than one.[4] No person may be appointed a clerk by any judge to whom he is related by affinity or consanguinity within the degree of first cousin, nor be employed in any office or duty in any court of which such judge is a member.[5] The clerk is required to take an oath for the faithful performance of his duty,[6] and also to give an official bond, in a sum to be fixed by the judge who appoints him, for the faithful discharge of the duties of the office; and a new bond may be required whenever the court deems it proper for a new one to be given. It is further required that such bonds be entered upon the journal of the court for which he is appointed, and deposited for safe keeping in such place as the court may direct; and a certified copy of such entry on the journal is made *prima facie* proof of the execution of such bond and of the contents thereof.[7] Clerks are required to permanently reside within

[1] Rev. Stat. § 714.

[2] Rev. Stat. § 713.

[3] Rev. Stat. § 555.

[4] Rev. Stat. §§ 556, 557. The power to appoint clerks and remove them, and their tenure of office, are fully discussed in *Ex p.* Hennen, 13 Peters 230. In some districts, consisting of several divisions, clerks are to be appointed to reside at each place designated for holding the court. The acts relating to the appointment of clerks at special places may be found in the Revised Statutes and supplements. In the next chapter the times and places of holding the district and circuit courts are set forth; usually a clerk of the court is required to have an office at each place where the court is held.

[5] Act of August 13, 1888, 25 Stat L. 433; 1 Supp. R. S. 614. This does not invalidate appointments made before the statute was passed. Northwestern Mut. Life Ins. Co. *v.* Seaman, 80 Fed. Rep. 357.

[6] Rev. Stat. § 794.

[7] Rev. Stat. § 795.

their districts, except in the Southern District of New York they may reside within twenty miles of their district.[1]

Duties of Clerks.

§ 14. Besides various minor and special duties required to be performed by the clerk, his general duties more particularly demand that he faithfully enter and record all the orders, decrees, judgments and proceedings of the court; and the official oath required of him provides that he will faithfully perform this duty as well as impartially discharge and perform all the duties of his office according to the best of his ability and understanding.[2] No clerk or deputy may be appointed receiver or master in any case except where the judge of the court shall determine that special reasons exist therefor, to be assigned in the order of appointment.[3] Where no special reason was assigned, but the order was made in open court with the assent of the solicitors of both parties, the court amended the order *nunc pro tunc*, setting out the assent of counsel as a special reason.[4]

Compensation of Clerks.[5]

§ 15. Section 828 of the Revised Statutes provides in detail for fees to be charged by the clerk for the various services he is required to perform;[6] and section 833 requires him semi-annually to make a written return to the Attorney-General, for the preceding half year, of all the fees and emoluments of his office, and of all the expenses of the office, including necessary clerk-hire, together with the vouchers for the payment of the same for such last half year, which return must be verified by oath.[7] No

[1] Act of June 20, 1874, 18 Stat. L. 85; 1 Supp. R. S. 16.

[2] Rev. Stat. § 794.

[3] Act of March 3, 1879, 20 Stat. L. 410; 1 Supp. R. S. 254.

[4] Fischer *v.* Hayes, 22 Fed. Rep. 92; s. c. 22 Blatch. 505.

[5] Sec. 22 of the Act of May 28, 1896, provides "That it shall be the duty of the Attorney-General of the United States to make an investigation as respects the compensation to be paid, by salary or otherwise, to clerks of United States circuit and district courts; and he shall report on the first day of the next session of the present Congress a plan for fixing such compensation for the clerks of the several courts of the United States as he may deem just, and he shall also recommend with his report such provisions as may to him seem proper touching their appointment and the performance of their duties." 29 Stat. L. 140; 2 Supp. R. S. 487.

[6] Rev. Stat. § 834.

[7] Rev. Stat. § 839.

clerk shall include in his emolument account any fee not actually earned and due at the time such account is required by law to be made, and no fees not actually earned shall be allowed in any such account.[1] But no clerk of a district or circuit court shall be allowed by the Attorney-General to retain of the fees and emoluments of his office, for his personal compensation, a sum exceeding three thousand five hundred dollars a year, or at that rate for a shorter length of time, unless both clerkships are held by the same person ;[2] except in California, Oregon and Nevada, where they are allowed to charge double the ordinary fees allowed clerks, and they are allowed to retain of the fees received by them for their personal services an amount not exceeding seven thousand dollars a year, or at that rate for a shorter time ;[3] and the allowance for personal compensation of clerks for each year must be made from the fees and emoluments of that year ;[4] but in prize causes they may retain for official services an additional compensation not exceeding in amount one-half of the maximum compensation allowed them as aforesaid.[5] It is made the duty of the clerk, at the time of making his semi-annual return, to pay into the treasury of the United States, or deposit to the credit of the Treasurer, as may be directed by the Attorney-General, any surplus of the fees and emoluments of his office which the return shows to exist over and above the compensation allowed as aforesaid, except for the necessary expenses of his office, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the treasury.[6] Before any account shall be allowed by any of-

[1] Act of March 2, 1895, 28 Stat. L. 910; 2 Supp. R. S. 432.

[2] Rev. Stat. § 839.

[3] Rev. Stat. § 840.

[4] Rev. Stat. § 843.

[5] Rev. Stat. § 842.

[6] Rev. Stat. §§ 833, 839, 844. This is not a revenue law within Rev. Stat. § 699, which gives jurisdiction to the Supreme Court of the United States without regard to the amount in dispute. U. S. *v.* Hill, 123 U. S. 681. In U. S. *v.* Van Duzee, 140 U. S. 169, 199, the Supreme Court construed the clerks' fee bill in some important particulars, holding that clerks are entitled to fee for filing each paper as it is sent up by a commissioner in a criminal case; also to fee for filing oaths, bonds and appointments of deputy marshals, jury commissioners, bailiffs, district attorneys and their assistants, and for recording them if required by the court or by custom to do so; but not for administering the oaths of office to them or preparing their official bonds. Also to legal charge for approving

ficer of the Treasury in favor of a clerk he must render it with the vouchers and items thereof to a United States circuit or district court, and, in the presence of the district attorney or his sworn assistant, whose presence shall be noted on the records, prove in open court, to the satisfaction of the court by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated, and that the disbursements charged have been fully paid in lawful money, and the court shall thereupon cause to be entered of record an order approving or disapproving the account.[1]

Commissions for Receiving and Paying Out Money.

§ 16. The clerk, under the provisions of the statutes, is entitled to a commission for receiving, keeping and paying out moneys obtained by fines, penalties or forfeitures under the revenue laws.[2] But he is not entitled to a commission on money received by a commissioner and paid out by him in proceedings in bankruptcy.[3] Money must actually or constructively pass through the clerk's hands to entitle him to commissions.[4] A clerk who receives, keeps and pays out money under a judgment is entitled to a commission of one per cent. on the amount so received, to be paid by the defendant as part of the costs.[5]

the accounts of such officers under the Act of February 22, 1875 (18 Stat. L. 333; 1 Supp. R. S. 65), for furnishing a copy of indictment to the defendant when ordered by the court to do so, but not otherwise; for filing criminal cases sent up by a commissioner, but not for docketing the same unless indictment is found; for authenticated copies of orders for payment by the marshal of sums due witnesses and jurors, when required by the Treasury Department; for entering an order for trial and recording a verdict in a criminal case; to charge for filing precipes for bench-warrants, but no such precipe is required after sentence; to charge for incorporating the transcript from the commissioner when it is the practice of the court to require records to be made up in criminal cases; to charge for copies of subpœnas furnished to the marshal to be left with witnesses, when in a district there is a rule of court requiring the clerk to make such copies.

[1] Act of Feb. 22, 1875, 18 Stat. L. 333; 1 Supp. R. S. 65.

[2] *In re* Goodrich, 4 Dill. 230; Upton *v.* Triblecock, 4 Dill. 232.

[3] United States *v.* One Horse, 7 Ben. 405. See also The Avery, 2 Gallis. 308.

[4] *Ex parte* Prescott, 2. Gall. 146; Leach *v.* Kay, 4 Fed. Rep. 72; Thomas *v.* Chicago & C. G. R. Co. 37 *id.* 548.

[5] Blake *v.* Hawkins, 19 Fed. Rep. 204, and cases cited.

Deputy Clerks.

§ 17. One or more deputies of any clerk of a district court may be appointed by the court, on the application of the clerk, and may be removed at the pleasure of judges authorized to make the appointment. A deputy thus appointed may sign a warrant, citation or monition, and do every act which the clerk is authorized by law to do.[1] In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasances in office of any such deputy, whether in the life-time of the clerk or after his death, the clerk, and his estate, and the sureties in his official bond, shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his life-time.[2]

Compensation of deputy clerks.—The compensation of deputies of the clerks of the district courts shall be paid by the clerks, respectively, and allowed in the same manner that other expenses of the clerks' offices are paid and allowed.[3]

Official Bond of Deputy Clerks.

§ 18. Any circuit or district court may require any deputy clerk thereof to give a bond to the United States for the faithful discharge of his duty as such deputy, in the same penalty, and with surety in the same manner, as is required by law of clerks; and it is required that such bond be recorded and preserved in like manner. The taking of this bond, however, does not affect the legal responsibility of the clerk also for the official acts of the deputy.[4]

Records, Where Kept.

§ 19. The records of a district court shall be kept at the place where the court is held. When it is held at more than one place in any district, and the place of keeping the records is not specially provided by law, they shall be kept at either of the places of holding the court which may be designated by the district judge.[5]

[1] The Confiscation Cases, 20 Wall. 92; Bragg *v.* Loris, 1 Woods 209.
[2] Rev. Stat. § 558.
[3] Rev. Stat. § 561.
[4] Rev. Stat. § 796.
[5] Rev. Stat. § 562.

Marshals and their Deputies.

§ 20. It is essential to the proper discharge of the functions of courts that they have some executive officer for the service of process and the execution of their judgments. For this purpose it is provided by statute that a marshal shall be appointed in each district, except in the western district of South Carolina; and that he shall hold his office for the term of four years.[1] The marshal of the eastern district of South Carolina is required to perform the duties of marshal in the western district of that state;[2] marshals are required to reside permanently within their districts, except in the southern district of New York, where they may reside within twenty miles of their district.[3]

DEPUTY MARSHALS.—It is further provided that every marshal may appoint one or more deputies, who shall be removable from office by the judge of the district court, or by the circuit court of the district, at the pleasure of either.[4] The appointment of deputies is regulated by the Act of May 28, 1896, which provides:

Sec. 10. That when, in the opinion of the Attorney-General, the public interest requires it, he may, on the recommendation of the marshal, which recommendation shall state the facts as distinguished from conclusions, showing necessity for the same, allow the marshals to employ necessary office deputies and clerical assistance, upon salaries to be fixed by the Attorney-General from time to time and paid as hereinafter provided. When any of such office deputies is engaged in the service or attempted service of any writ, process, subpœna, or other order of the court, or when necessarily absent from the place of his regular employment on official business, he shall be allowed his actual traveling expenses only, and his necessary and actual expenses for lodging and subsistence, not to exceed two dollars per day, and the necessary actual expenses in transporting prisoners,

[1] Rev. Stat. §§ 776, 779. An exception was made in the States of Alabama, Georgia and South Carolina. Alabama is given a marshal for each district by Act of March 3, 1893, 27 Stat. L. 745; 2 Supp. R. S. 134; and Georgia by Act of April 25, 1882, 22 Stat. L. 47; 1 Supp. R. S. 336. The authority and powers of marshals and their deputies do not extend beyond the districts for which they are appointed. Walker *v.* Lea, 47 Fed. Rep. 645.

[2] Rev. Stat. §§ 776, 777.

[3] Act of June 20, 1874, 18 Stat L. 85; 1 Supp. R. S. 16.

[4] Rev Stat. § 780.

including necessary guard hire; and he shall make and render accounts thereof as hereinafter provided.

Sec. 11. That at any time when, in the opinion of the marshal of any district, the public interest will thereby be promoted, he may appoint one or more deputy marshals for such district, who shall be known as field deputies, and who, unless sooner removed by the district court as now provided by law, shall hold office during the pleasure of the marshal, except as hereinafter provided, and who shall each, as his compensation, receive three-fourths of the gross fees, including mileage, as provided by law, earned by him, not to exceed one thousand five hundred dollars per fiscal year, or at that rate for any part of a fiscal year; and in addition shall be allowed his actual necessary expenses, not exceeding two dollars a day, while endeavoring to arrest, under process, a person charged with or convicted of crime: *Provided*, That a field deputy may elect to receive actual expenses on any trip in lieu of mileage: *Provided*, That in special cases, where in his judgment justice requires, the Attorney-General may make an additional allowance not, however, in any case to make the aggregate annual compensation of any field deputy in excess of twenty-five hundred dollars nor more than three-fourths of the gross fees earned by such field deputy. The marshal, immediately after making any appointment or appointments under this section, shall report the same to the Attorney-General, stating the facts as distinguished from conclusions constituting the reason for such appointment, and the Attorney-General may at any time cancel any such appointment as the public interest may require. The field deputies herein provided for of the districts of California, Colorado, Washington, Montana, North Dakota, South Dakota, Nevada, Oregon, Wyoming, and Idaho shall for the services they may perform during the fiscal year eighteen hundred and ninety-seven, receive double the fees allowed by law to like officers in other States for performing similar duties, but neither of them shall be allowed to receive of such fees any sum exceeding the aggregate compensation of such officer as provided herein.

Sec. 12. That the marshal, when attending court at any place other than his official residence, and when engaged in the service or attempted service of any process, writ, or subpœna, and when

otherwise necessarily absent from his official residence on official business, shall be allowed his necessary expenses for lodging and subsistence, not exceeding four dollars per day, and his actual necessary traveling expenses. He shall also be allowed the actual necessary expenses in transporting prisoners, including necessary guard hire. An account of such expenses shall be made out and paid as hereinafter provided. The marshal's official residence shall be deemed to be at one of the places of holding court in the district, and the Attorney-General shall be authorized to fix and declare the place of such official residence.

Sec. 13. The expense accounts of the marshals and their office deputies and the accounts of the field deputies shall be paid by the marshals; said accounts when made out in accordance with this act shall be submitted to and examined by the circuit court or district court of the district, and when approved by the court shall be audited and allowed as now provided by law. Each marshal shall make such returns of the earnings and expenses of his office as shall be required under rules and regulations prescribed by the Attorney-General: *Provided*, That no office or field deputy shall receive compensation as bailiff, and no field deputy shall receive fees for representing the marshal in court.

Sec. 14. The necessary office expenses of the marshal shall be allowed when authorized by the Attorney-General.[1]

Official Oaths of Marshals and their Deputies.

§ 21. It is the duty of every marshal and deputy marshal, before he enters upon the duties of the office, to take an oath to faithfully execute the duties of the office, the form of which, and

[1] These sections do not apply to Alaska. *Ibid.* § 24. They were made applicable to Indian Territory by Act of February 19, 1897, ch. 265, 29 Stat. L. 538; 2 Supp. R S. 556. An office deputy has been held to be protected by the civil service laws and not subject to removal by the marshal. Priddie *v.* Thompson, 82 Fed. Rep. 186. But in Taylor *v.* Kercheval, 82 Fed. Rep. 497, it was held that an office deputy has no vested right of property in his office: his tenure thereof terminates with the expiration of the marshal's official term and a court of equity has no jurisdiction to restrain the marshal from removing him nor to enforce the President's rule placing such deputies on the civil service list.

the parties before whom it may be taken, being particularly pointed out in section 782 of the Revised Statutes.[1]

Marshals' Fees and Salaries.

§ 22. Section 6 of the Act of May 28, 1896,[2] provides that on and after July 1, 1896, all fees and emoluments authorized by law to be paid to a United States marshal shall be charged as heretofore, and shall be collected, as far as possible, and paid to the clerk of the court having jurisdiction and by him covered into the Treasury of the United States.[3] By section 9 of the same Act the marshal for each district shall be paid, in lieu of the salaries, fees, per centums and other compensations now allowed by law, annual salaries as follows: ALABAMA, northern and middle districts, $4,000; southern district, $3,000. ARIZONA, $4,000. ARKANSAS, eastern district, $4,000; western district, $5,000. CALIFORNIA, northern district, $4,000; southern district, $3,000. COLORADO, $4,000. CONNECTICUT, $2,000. DELAWARE, $2,000. DISTRICT OF COLUMBIA, $5,500. FLORIDA, northern and southern districts, $3,000 each. GEORGIA, northern district,

[1] See *post*, ch. Fees of Officers. The oath may be administered by any officer of the United States or of any state authorized by law to administer oaths. Act of Dec. 22, 1896, 29 Stat. L. 479; 2 Supp. R. S. 536.

[2] 29 Stat. L. 140; 2 Supp. R. S. 479.

[3] This act does not apply to Alaska. *Ibid.* § 24. It was made applicable to Indian Territory by Act of Feb. 19, 1897, ch. 265, 29 Stat. L. 538; 2 Supp. R. S. 556.

In United States *v.* Fletcher, 147 U. S. 664, the following rulings upon the subject of marshals' fees were made: "When, for convenience in making up accounts, an outgoing marshal relinquishes to his successor his right to expenses incurred in endeavoring to arrest persons for offences against the United States, the incoming marshal may charge these fees in his accounts, and they should be allowed.

"A marshal of a district into which an offender who has committed a crime in another district comes, may deputize the marshal of the district in which the offence was committed, or his deputy, to execute the warrant of removal, and relinquish to him the fees therefor.

"The treasury officers have a right to require of a marshal items of expenses incurred in endeavoring to arrest persons charged with the commission of crime. When claims against the United States are presented to the proper department for allowance, and the department suspends action until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken.

"A marshal may charge mileage upon as many writs as he may have in his hands, where the writs are against different persons."

$5,000; southern district, $3,500. IDAHO, $3,000. ILLINOIS, northern district, $5,000; southern district, $4,500. INDIAN TERRITORY, northern, central and southern districts, $4,000 each.[1] INDIANA, $4,500. IOWA, northern and southern districts, $4,000 each. KANSAS, $4,000. KENTUCKY. $5,000. LOUISIANA, eastern district, $3,000; western district, $2,500. MAINE, $3,000. MARYLAND, $3,500. MASSACHUSETTS, $5,000. MICHIGAN, eastern district, $4,000; western district, $3,000. MINNESOTA, $4,000. MISSISSIPPI, northern and southern districts, $3,000 each. MISSOURI, eastern and western districts, $4,000 each. MONTANA, $3,500. NEBRASKA, $3,500. NEVADA, $2,500. NEW HAMPSHIRE, $2,000, NEW JERSEY, $3,000. NEW MEXICO, $4,000. NEW YORK, northern district, $5,000; eastern district, $4,000; southern district, $5,000. NORTH CAROLINA, eastern district, $4,000; western district, $4,500. NORTH DAKOTA, $4,000. OHIO, northern and southern districts, $4,000 each. OKLAHOMA, $5,000. OREGON, $4,000. PENNSYLVANIA, eastern and western districts, $4,000 each. RHODE ISLAND, $2,000. SOUTH CAROLINA, eastern and western districts, $4,500; $2,500 of which shall be for the performance of the duties of marshal of the western district. SOUTH DAKOTA, $4,000. TENNESSEE, eastern, middle and western districts, $4,000 each. TEXAS, northern district, $3,000; eastern district, $5,000; western district, $4,000. UTAH, $3,500. VERMONT, $2,500. VIRGINIA, eastern district, $3,500; western district, $4,000. WASHINGTON, $4,000. WEST VIRGINIA, $4,000. WISCONSIN, eastern and western districts, $4,000 each. WYOMING, $3,500.

These salaries are paid monthly by the Department of Justice.[2]

Marshal's Bond.

§ 23. Before any person can enter upon the duties of the office of marshal, he is required to give a bond in the sum of twenty thousand dollars, before the district judge of the district, with sufficient sureties, who must be inhabitants and freeholders of the district, and the bond must be approved by said judge, for the faithful performance of the duties of himself and his deputies. The bond is required to be filed in the office of the

[1] Act of Feb. 19, 1897, 29 Stat. L. 538; 2 Supp. R. S. 557.
[2] *Ibid.* § 16.

clerk of the district or circuit court sitting within the district, and copies thereof, certified by the clerk, are made competent evidence in any court of justice.[1] Clerks and marshals can be required to give greater security in a bond not to exceed forty thousand dollars, when in the opinion of the Attorney General the business of the courts shall make it necessary, the amount to be fixed by the Attorney General.[2]

If the bond is not approved by the district judge, it cannot be considered as accepted by the United States, as he alone has authority to accept it; and a bond with one surety is not such a bond as the law requires.[3]

Suits on Marshals' Bonds; Costs.

§ 24. Any person injured by a breach of the condition of a marshal's bond may maintain an action thereon in his own name, and recover such damages as he may have sustained, and as shall be legally assessed, with costs; but if he fails to recover, execution may issue against him for costs in favor of the defendant. In no case, however, can the United States be made liable for costs.[4]

The proceedings against the marshal and his sureties must be by action in the usual way, and they cannot be proceeded against in a summary manner, as provided by state laws.[5]

Bond to Remain after Judgment; Limitation of Action on.

§ 25. The bond remains as a surety for any person injured by a breach of its conditions, after any judgment rendered thereon, until the whole penalty has been recovered, and the proceedings thereon should always be in the name of the party injured.[6] But no suit can be maintained on such bond unless

[1] Rev. Stat. § 783.

[2] Act of Feb. 22, 1875, 18 Stat. L. 333; 1 Supp. R. S. 65.

[3] Jackson *v.* Simonton, 4 Cr. C. C. 255.

[4] Rev. Stat. § 784. For construction of marshal's bond and liability of sureties see U. S. *v.* Giles, 9 Cr. 212; U. S. *v.* Adams, 54 Fed. Rep. 114.

[5] Gwin *v.* Breedlove, 2 How. 29; Gwin *v.* Barton, 6 How. 7. These two cases sustain the summary process of the state touching sheriffs as to the marshal alone, but not as against him and his sureties jointly. It may be in the name of the United States for the benefit of the party injured: U. S. *v.* Davidson, 1 Biss. 433.

[6] Rev. Stat. § 785. The wrong must be alleged and proved to be a violation of the marshal's official duty. Hawkins *v.* Thomas, 29 N. E. Rep. 157.

it is commenced within six years after the right of action accrues, except in cases of infants, married women and insane persons, who may sue within three years after their disabilities are removed.[1]

Duties and Powers of Marshals.

§ 26. It is the duty of the marshal of each district to attend the district and circuit courts and the circuit court of appeals when sitting therein, and to execute, in the district, all lawful precepts directed to him and issued under the authority of the United States; and he has authority to command all necessary assistance in the execution of his duty. He and his deputies have the same powers in each state in executing the laws of the United States as sheriffs and their deputies have by law in executing the laws thereof.[2] It is the further duty of the marshal, within thirty days before the commencement of each term of the circuit or district court of his district, to make returns to the Solicitor of the Treasury of the proceedings had upon all writs of execution, or other process, which have been placed in his hands for the collection of moneys adjudged and decreed to the United States, in said courts respectively;[3] and if an execution upon a judgment in any suit for moneys due on account of the Post-Office Department shall be directed to him, he is required to make returns to the Sixth Auditor, of the proceedings which have taken place upon such process at such times as said auditor may direct.[4] Original process must be served by a marshal, and cannot be properly served by a private person.[5] But a subpœna may be served by a private person, for its mandate is to the witness and not to the marshal.[6]

[1] Rev. Stat. § 786. For a construction of this section see United States *v.* Rand, 4 Saw. 272; Same *v.* Godbold, 3 Woods, 550; Montgomery *v.* Hernandez, 18 Wheat. 120.

[2] Rev. Stat. §§ 787, 788. Marshals and their deputies when especially charged to protect a federal judge while in the discharge of his duties, must keep the peace even to the taking of human life: and the marshal is acting under the laws of the United States, and is not liable to prosecution in the state courts. *Re* Neagle, 135 U. S. 1. Marshals have same power to arrest without warrant as sheriffs in the states where they act. Carico *v.* Wilmore, 51 Fed. Rep. 196. *Re* Acker, 66 *id.* 290.

[3] Rev. Stat. § 791.

[4] Rev. Stat. § 792.

[5] Schwabacker *v.* Reilly, 2 Dill. 127.

[6] Scott *v.* Allen, 6 Phila. 484; Russell *v.* Ashley, Hemp. 546; Scott *v.* Schwabacker *v.* Reilly, 2 Dill. 127.

Duty of the Deputy in Case of the Death of the Marshal.

§ 27. Section 789 of the Revised Statutes provides: "In case of the death of any marshal, his deputy or deputies shall continue in office unless otherwise specially removed, and shall execute the same in the name of the deceased, until another marshal is appointed, as provided in this chapter, and duly qualified. The defaults or misfeasances in office of such deputies in the meantime shall be adjudged a breach of the condition of the bond given by the marshal who appointed them; and the executor or administrator of the deceased marshal shall have like remedy for defaults and misfeasances in office of such deputies, during such interval, as he would be entitled to if the marshal had continued in life and in the exercise of his said office, until his successor was appointed and duly qualified."[1]

District and Assistant District Attorneys; Appointment.

§ 28. One of the most important officers of the court is the district attorney, who acts as the attorney for the government within the district for which he is appointed.

It is provided by statute that there shall be appointed in each district, except in the western district of South Carolina,[2] a person learned in the law, to act as attorney in such district; and that the district attorney of the eastern district of South Carolina shall perform the duties of the office for the western district of that state.[3]

By section 8 of the Act of May 28, 1896,[4] whenever, in the opinion of the district judge of any district, or the chief justice of any territory, and the district attorney, evidenced by writing, the public interest requires it, one or more assistant district attorneys may be appointed by the Attorney-General; but such opinion shall state to the Attorney-General the facts as dis-

[1] See also Rev. Stat. 790. For further information on the subject reference may be had to ch. 14, Rev. Stat.

[2] Alabama is given a district attorney for each district by Act of March 3, 1893, 27 Stat. L. 745; 2 Supp. R. S. 134; and Georgia by Act of April 25, 1882, 22 Stat. L. 47; 1 Supp. R. S. 336.

[3] Rev. Stat. § 767: amended by Act of Feb. 24, 1879, ch. 97, § 8, 20 Stat. L. 320.

[4] This section does not apply to the office of United States attorney and his assistants for the southern district of New York, or the District of Columbia, nor to Alaska. *Ibid.* § 24. It is made applicable to Indian Territory by Act of Feb. 19, 1897, 29 Stat. L. 538; 2 Supp. R. S. 556.

tinguished from conclusions, showing the necessity therefor. Such assistant district attorneys shall be paid such salary as the Attorney-General may from time to time determine as to each, which shall in no case exceed two thousand five hundred dollars per annum. *Provided*, That the necessary expenses for lodging and subsistence actually paid, not exceeding four dollars per day, and actual and necessary traveling expenses of the district attorney and his assistants while absent from their respective official residences and necessarily employed in going to, returning from, and attending before any United States court, commissioner or other committing magistrate, and while otherwise necessarily absent from their respective official residences on official business, shall be allowed and paid in the manner hereinafter provided.

The Attorney-General is authorized to fix and declare the place of the official residence of the district attorney and of each of his assistants: *Provided*, That the said assistants must be residents of the districts for which they are appointed.

The district attorney of any judicial district, when the facts showing the necessity therefor are certified by the district judge to the Attorney-General, may, with the approval of the Attorney-General, and no longer than such approval lasts, employ necessary clerical assistance at such salary or salaries as shall be from time to time fixed by the Attorney-General.[1]

The expense accounts of district attorneys and their assistants when made out in accordance with the terms of this act shall be submitted to and examined by the circuit court or district court of the district, and when approved by the court shall be audited and allowed as now provided by law.[2]

The necessary office expenses of the district attorneys shall be allowed when authorized by the Attorney-General.[3]

District Attorneys' Fees and Compensation.

§ 29. Chapter xvi. of the Revised Statutes provides for the fees and compensation of district attorneys, clerks, marshals,

[1] Act of May 28, 1896, § 15, 29 Stat. L. 140; 2 Supp. R. S. 485. This Act does not apply to the southern district of New York, the District of Columbia or Alaska. *Ibid.* § 24. It is made applicable to Indian Territory by Act of Feb. 19, 1897, 29 Stat. L. 538; 2 Supp. R. S. 556.

[2] *Ibid.* § 13.

[3] *Ibid.* § 14.

commissioners and other officers; and sections 823 and 824 of said chapter, what costs may be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, which embraces district attorneys.

By section 6 of the Act of May 28, 1896,[1] it is provided that on and after July 1, 1896, all fees and emoluments authorized by law to be paid to United States district attorneys shall be charged as theretofore, and shall be collected as far as possible and paid to the clerk of the court having jurisdiction and by him covered into the treasury of the United States: said officers shall be paid for their official services, which shall include services in the circuit courts of appeals of their respective circuits.[2]

Section 7 of the same act provides that district attorneys shall be paid in lieu of the salaries, fees, per centums, and other compensations now allowed by law, an annual salary as follows: ALABAMA, northern and middle districts, each $4,000; southern district, $3,000; ARIZONA, $4,000; ARKANSAS, eastern district, $4,000; western district, $5,000; CALIFORNIA, northern district, $4,500; southern district, $3,500; COLORADO, $4,000; CONNECTICUT, $2,500; DELAWARE, $2,000; FLORIDA, northern and southern districts, each $3,500; GEORGIA, northern district, $5,000; southern district, 3,500; IDAHO, $3,000; ILLINOIS, northern and southern districts, each $5,000; INDIAN TERRITORY, northern, central and southern districts, each $4,000;[3] INDIANA, $5,000; IOWA, northern and southern districts, each $4,500; KANSAS, $4,500; KENTUCKY, $5,000; LOUISIANA, eastern district, $3,500; western district, $2,500; MAINE, $3,000; MARYLAND, $4,000; MASSACHUSETTS, $5,000; MICHIGAN, eastern district, $4,000; western district, 3,500; MINNESOTA, $4,000; MISSISSIPPI, northern and southern districts, each $3,500; MISSOURI, eastern and western districts, each $4,500; MONTANA, $4,000; NEBRASKA, $4,000; NEVADA, $3,000; NEW HAMPSHIRE, $2,000; NEW JERSEY, $3,000; NEW MEXICO, $4,000; NEW YORK, northern and eastern districts, each $4,500; NORTH CAROLINA, eastern district, $4,000; western

[1] Act of May 28, 1896, 29 Stat. L. 140; 2 Supp. R. S. 479.

[2] This does not apply to the office of United States Attorney for the southern district of New York, or the District of Columbia, nor to Alaska; *ibid.* § 24.

[3] Act Feb. 19, 1897, 29 Stat. L. 538; 2 Supp. R. S. 557

district, $4,500; NORTH DAKOTA, $4,000; OHIO, northern and southern districts, each $4,500; OKLAHOMA, $5,000; OREGON, $4,500; PENNSYLVANIA, eastern and western districts, $4,500; RHODE ISLAND, $2,500; SOUTH CAROLINA, eastern and western districts, $4,500; $2,500 of which shall be for the performance of the duties of district attorney for the western district: SOUTH DAKOTA, $4,000; TENNESSEE, eastern, middle and western districts, each $4,500; TEXAS, northern district, $3,500; eastern district, $5,000; western district, $4,000; UTAH, $4,000; VERMONT, $3,000; VIRGINIA, eastern district, $4,000; western district, $4,500; WASHINGTON, $4,500; WEST VIRGINIA, $4,500; WISCONSIN, eastern and western districts, each $4,000; WYOMING, $4,000.

All salaries provided by this act are payable by the Department of Justice monthly.[1]

The district attorney for the southern district of New York is entitled to receive quarterly a salary at the rate of six thousand dollars a year; and in addition to the salary he is entitled to such additional sum as may be necessary, together with the costs and fees allowed him by law, to pay such amount as may be fixed by the Attorney General for the proper expenses of his office. But the restrictions above referred to do not prevent the allowance of additional compensation for services in prize cases.[2] In such cases the district attorney is allowed just and reasonable compensation, to be adjusted and determined by the court.[3]

Section 18 provides, That any officer whose compensation is fixed by sections 6 to 15 inclusive of this act who shall directly or indirectly demand, receive or accept any fee or compensation for the performance of any official service other than is herein provided, or shall wilfully fail or neglect to account for or pay over to the proper officer any fee received or collected by him shall, upon conviction thereof, be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment, at the discretion of the court, not exceeding five years, or by both such fine and imprisonment.

Various sections of Chapter xvi. of the Revised Statutes provide for extra compensation for special and extraordinary services;

[1] Act of May 28, 1896, § 16.

[2] Rev. Stat. §§ 770, 836.

[3] Rev. Stat. § 4646. For fees of officers see *post*, ch. xiii.

but the district attorney is required semi-annually in each year, to wit, "on the first days of January and July, or within thirty days thereafter, to make to the Attorney-General, in such form as he may prescribe, a written return for the half year ending on said days respectively, of all fees and emoluments of his office of every name and character, and of all the necessary expenses of his office, including necessary clerk-hire, together with the vouchers for the payment of the same for such last half year." Said returns are required to be verified by the oath of the district attorney making the same.[1]

The return is required to embrace all fees, charges and emoluments to which he may be entitled by reason of the discharge of the duties of his office,[2] except fees he may have received in suits or proceedings arising under the revenue laws of the United States, conducted by him, and in which the United States were a party, in which he is allowed two per centum upon the moneys collected,[3] and except such compensation as he may have received for official duty performed by direction of the Secretary or Solicitor of the Treasury, on behalf of any officer of the revenue in any suit against such officer, or for the recovery of any money received by him and paid into the treasury of the United States, in the performance of his official duty; in which case he is allowed such compensation as may be certified to be proper by the court in which the suit is brought, and approved by the Secretary of the Treasury.[4]

Duties of District Attorney.

§ 30. It is the duty of this officer to prosecute in his district all delinquents, for crimes and offences cognizable under the laws and authority of the United States, and all civil actions in which the United States are concerned, and to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors or other officers of the revenue of the United States, for any act done by them, or for the recovery of any money exacted by or paid to such officers, and by them paid into the treasury of the United States, unless otherwise instructed by the Secretary of the Treasury.[5] He is further required, on

[1] Rev. Stat. § 833.
[2] Rev. Stat. § 834.
[3] Rev. Stat. § 825.
[4] Rev. Stat. § 827.
[5] Rev. Stat. § 771.

instituting any suit for the recovery of any fine, penalty or forfeiture, to transmit, immediately, a statement thereof to the Solicitor of the Treasury;[1] and, immediately after the end of every term of the circuit and district courts for his district, to forward to the Solicitor of the Treasury a full and particular statement of all causes pending in said courts respectively, and of all causes decided therein during said term in which the United States are a party, which statement must be accompanied by the certificate of the clerks of said courts respectively;[2] provided, however, that if any suit or proceeding is commenced, under the internal revenue laws, to which the United States are a party, or any suit or proceeding is instituted against a collector or other officer of the internal revenue, wherein a district attorney appears, it is made the duty of the attorney of the district in which it is brought to report to the Commissioner of Internal Revenue the full particulars relating to the same, and, immediately after the end of each term of the said courts where such suit is pending, forward to said commissioner a full and particular statement of its condition.[3]

He is further required, on the first day of October in each year, to make a return to the Solicitor of the Treasury of the number of suits and proceedings commenced, pending and determined within his district within the fiscal year next preceding the date of such return, showing the date of the commencement of such suit or proceeding; and if the determination of the same has been delayed beyond the usual or a reasonable period, he must state the reasons therefor, and the measures taken by him to press such suits or proceedings to a close.[4]

He is also required, immediately after the end of a term in which any suit for moneys due on account of the Post-Office Department has been pending in his district, to forward to the Department of Justice a statement of any judgment or order made or steps taken in the same during such term, accompanied by a certificate of the clerk showing the parties to and the amount of every such judgment, with such other information as the Department of Justice may require. It is also his duty to direct speedy and effectual execution upon any judgment, and the marshal to

[1] Rev. Stat. § 772.
[2] Rev. Stat. § 773.
[3] Rev. Stat. § 774.
[4] Rev. Stat. § 773.

whom it is directed must make return of his proceedings thereon to the same department at such times as it may direct.[1]

When any collector of customs or of internal revenue shall report to him, according to law, any case in which any fine, penalty or forfeiture has been incurred in his district for the violation of any law of the United States relating to the revenue, it is his duty to cause the proper proceedings to be commenced and prosecuted without delay for the fines, penalties and forfeitures in such cases provided, unless he shall determine, upon an examination and inquiry, that the proceedings could not be sustained or that the ends of justice do not require it; in which case it is his duty to report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue, for their direction.[2]

Duty to Prosecute for Crimes.

§ 31. As it is made the duty of the prosecuting attorney "to prosecute in his district all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States are concerned," it has been held that the federal courts could not properly take cognizance of a cause in the name of the United States unless it is prosecuted by the district attorney of the district;[3] and where the prosecution was for a contempt of court in which the United States was interested as plaintiff, it was held that the district attorney should appear as prosecutor.[4] But he has no power to dismiss a criminal charge under examination before a commissioner, although after indictment found and before the trial is commenced, it seems he has absolute power to enter a *nolle prosequi*.[5]

He is the Recognized Officer of the Government.

§ 32. The federal courts will not recognize a suit, civil or criminal, as legally before them in the name of the United States, unless it be instituted and prosecuted by a district attorney duly

[1] Rev. Stat. § 775.

[2] Rev. Stat. § 838.

[3] United States *v.* McAvoy, 4 Blatch. 418; United States *v.* Doughty, 7 *id.* 424; United States *v.* Blaisdell, 3 Ben. 132.

[4] Durant *v.* Washington Co., 1 Woolw. 377.

[5] United States *v.* Schumann, 2 Abb. U. S. 523.

appointed and commissioned for that purpose.[1] He is the officer of the government who has the proper charge of its legal proceedings within the district, subject only to the supervision of the Attorney-General. If other attorneys or counsel are employed by the government it is to aid him, and not as official representatives of the government.[2] And if the bill, declaration or other pleading on the part of the government does not show that the suit was instituted by the proper district attorney, it would be demurrable.[3] The court can only have communication with the executive officers of the government through the district attorney.

It is made, as we have seen, the duty of the district attorney to prosecute in his district all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States are concerned; and it is his further duty to provide the marshal with the necessary process to carry into execution the judgments of the courts. He should attend the sessions of the grand jury, to advise that body on questions of law that may be presented, to examine witnesses, and, when required by them, to draw indictments. But he has no right to control the action of a grand jury or prevent its consideration of any particular case before it, by representing or declaring that the government will not prosecute it. Nor can he enter a *nolle prosequi* in a criminal case without the consent of the court.[4]

Term and Oath of Office of District Attorney; Vacancy.

§ 33. District attorneys are appointed for the term of four years, and their commissions expire at the end of four years from the date of the same; and every district attorney is required, before entering upon the duties of his office, to be sworn to a faithful execution of the duties of his office.[5] But no official bond seems to be required of him.

The president may remove a district attorney, before his term

[1] United States *v.* McAvoy, 4 Blatch. 418; United States *v.* Doughty, 7 Id 424.

[2] The Pueblo Case, 4 Saw. 553.

[3] United States *v.* Doughty, 7 Blatch. 424.

[4] United States *v.* Corrie, 23 L. R. 145. But see United States *v.* Watson, 7 Blatch. 60; United States *v.* Schumann, 2 Abb. C. C. 523.

[5] Rev. Stat. § 769.

of four years has expired, and appoint his successor, who must be confirmed by the Senate.[1]

In case of a vacancy in the office of the district attorney within any circuit, the circuit judge of such circuit may fill the same and the person so appointed shall serve until an appointment is made by the President and the appointee is duly qualified, and no longer.[2] Where the vacancy is in the office of United States attorney for the District of Columbia, the Supreme Court of the District is to make the temporary appointment.[3]

[1] Parsons *v.* U. S., 167 U. S. 324. In this case the court held that Congress in repealing the tenure of office sections of the Revised Statutes intended to give again to the President the power of removal (if it had been taken from him by the original tenure of office act), and to enable him to remove an officer when in his judgment it is for the public good, notwithstanding that the statute creating the office may have limited its term.

[2] Rev. Stat. § 793.

[3] Act of February 27, 1897, ch. 341, 29 Stat. L. 600; 2 Supp. R. S. 564.

CHAPTER IV.

TERMS AND SESSIONS OF THE CIRCUIT AND DISTRICT COURTS.

Regular Terms of the Circuit and District Courts.

§ 34. The Revised Statutes provide for the regular terms of the circuit and district courts, and other matters relating to them, which with various subsequent amendments are as follows:

TERMS OF CIRCUIT AND DISTRICT COURTS.—The regular terms of the circuit and district courts shall be held at the times and places following; but when any of said dates shall fall on Sunday, the terms shall commence on the following day:[1]

Alabama.—NORTHERN DISTRICT: *Northern Division.*—Circuit and districts courts: First Monday in April and second Monday in October, at Huntsville.[2]

Southern Division.—Circuit and district courts: First Mondays in March and September, at Birmingham.[3]

MIDDLE DISTRICT: Circuit court: First Mondays in May and November, at Montgomery.

District court: First Mondays in May and November, at Montgomery. A session of this court is also held on the first Mondays in each month under rules adopted.[4]

SOUTHERN DISTRICT: Circuit and district courts: Fourth Monday in November and first Monday in May, at Mobile.[5]

Alaska.—District court: First Monday in May, at Sitka. First Monday in November, at Juneau.[6]

[1] Rev. Stat. §§ 572, 658.

[2] Act of June 22, 1874, 1 Supp. R. S. 38.

[3] Act of May 2, 1884, 1 Supp. R. S. 427.

[4] Act of June 22, 1874, 1 Supp. R. S. 38.

[5] Act of June 26, 1890, 1 Supp. R. S. 760.

[6] Act of May 17, 1884, 1 Supp. R. S. 430.

Arizona.—Supreme court: Second Monday in January of each year, at Phœnix.

First District: Second Mondays in March and September, at Tucson.

Second District: First Mondays in May and November, at Florence.

Third District: First Mondays in May and November, at Phœnix.

Fourth District: First Mondays in June and November, at Prescott; second Monday in March and first Monday in August, at Flagstaff; first Mondays in April and September, at Kingman; third Monday in April and first Monday in October, at Saint Johns.[1]

Arkansas.[2]—Eastern District: *Eastern Division.*—Circuit and district courts: Second Mondays in March and October, at Helena.

Northern Division.—Circuit and district courts: Second Mondays in June and December, at Batesville.

Western Division.—Circuit court: Second Monday in April and fourth Monday in October, at Little Rock.

District court: First Mondays in April and October, at Little Rock.

Western District: *Texarkana Division.*—Circuit and district courts: Second Mondays in May and November, at Texarkana.

[1] Act of Feb. 11, 1891, 1 Supp. R. S. 893.

[2] Act of Feb. 20, 1897, 29 Stat. L. 590; 2 Supp. R. S. 558. All causes, civil and criminal, now pending in the courts respectively at Little Rock against persons residing in any of the counties made returnable to the courts to be held at Batesville, shall be determined and disposed of by said courts, and all causes, civil and criminal, now pending against persons residing in the county of Marion in the courts respectively at Fort Smith shall be determined and disposed of by said courts. And all causes, both civil and criminal, now pending at Little Rock against persons residing in the counties of Calhoun and Union shall be disposed of in said courts. All causes, process, bonds, recognizances and other things pending in, returnable or having relation to, the terms of said courts at Texarkana and Fort Smith now provided by law shall be proceeded with in the terms provided by this act with the same force and effect that would have been lawful had the times for holding said courts at said places not been changed. *Ibid.*

Fort Smith Division.—Circuit and district courts: Second Mondays in January and June, at Fort Smith.

California.—NORTHERN DISTRICT: Circuit and district courts: First Monday in March, second Monday in July, and first Monday in November, at San Francisco.[1]

SOUTHERN DISTRICT: Circuit and district courts: Second Monday in January and second Monday in August, at Los Angeles.[2]

Colorado.—Circuit and district courts: First Tuesdays in May and November, at Denver; first Tuesday in April, at Pueblo; first Tuesday in August, at Del Norte.[3]

Connecticut.—Circuit court: Fourth Tuesday in April, at New Haven; Second Tuesday in October, at Hartford.[4]

District court: Fourth Tuesday in February, fourth Tuesday in August, at New Haven; fourth Tuesday in May, first Tuesday in December, at Hartford.[5]

Delaware.—Circuit court: Third Tuesdays in June and October, at Wilmington.

District court: Second Tuesdays in January, April, June, and September, at Wilmington.

District of Columbia.—Court of appeals: First Mondays in January, April, and October.

Supreme court, general term: First Mondays in January April, and October.

Circuit court: First Tuesdays in January, April, and October.

Equity court: First Tuesday in every month.

District court: First Mondays in January and July.

Criminal court: First Tuesdays in January, April, and October.

Each term to continue until the commencement of the next succeeding term.

Florida.—NORTHERN DISTRICT: Circuit and district courts: First Monday in February, at Tallahassee; first Monday in March, at Pensacola.[6]

[1] Act of May 25, 1896, 29 Stat. L. 136; 2 Supp. R. S. 474.

[2] *Ibid.*

[3] Act of Aug. 3, 1886, 1 Supp. R. S. 510.

[4] Act of June 10, 1896, 29 Stat. L. 317; 2 Supp. R. S. 511.

[5] Act of June 30, 1879, 1 Supp. R. S. 270.

[6] Rev. Stat. §§ 572, 658.

SOUTHERN DISTRICT: Circuit and district courts: Second Monday in February, at Tampa;[1] first Mondays in May and November, at Key West;[2] first Monday in December, at Jacksonville.[3]

District court also open at all times in admiralty.

Georgia.—NORTHERN DISTRICT: *Eastern Division.*—Circuit and district courts: Second Monday in March[4] and first Monday in October, at Atlanta.[5]

Western Division.—Circuit and district courts: First Mondays in May and December, at Columbus.[6]

SOUTHERN DISTRICT: Circuit court: First Mondays in May and October, at Macon;[7] second Monday in April and Thursday after first Monday in November, at Savannah;[8] first Monday in April and third Monday in November, at Augusta.[9]

District court: First Mondays in May and October, at Macon;[10] second Tuesdays in February, May, August, and November, at Savannah;[11] first Monday in April and third Monday in November, at Augusta.[12]

Idaho.—*Northern Division.*—Circuit and district courts: Second Mondays in May and October, at Moscow.

Central Division.—First Mondays in April and December, at Boise City.

Southern Division.—First Monday in March and second Monday in September, at Blackfoot.[13]

Illinois.—NORTHERN DISTRICT: *Northern Division.*—Circuit and district courts: First Mondays in March, May, July, and October, and third Monday in December, at Chicago.[14]

[1] Act of June 30, 1886, 1 Supp. R. S. 500.

[2] Rev. Stat. § 572.

[3] Act of July 23, 1894, 2 Supp. R. S. 203.

[4] Act of Feb. 23, 1889, 1 Supp. R. S. 650.

[5] Act of June 20, 1884, *ibid.*, 439.

[6] Act of Aug. 27, 1894, 2 Supp. R. S. 265.

[7] Act of June 29, 1880, 1 Supp. R. S. 276.

[8] Rev. Stat. § 658.

[9] Act of Feb. 15, 1889, 1 Supp. R. S. 643.

[10] Act of Jan. 29, 1880, 1 Supp. R. S. 277.

[11] Rev. Stat. § 572.

[12] N. E. Div. Act of Feb. 15, 1889, 1 Supp. R. S. 643.

[13] Act of Nov. 3, 1893, 2 Supp. R. S. 150.

[14] Rev. Stat. §§ 572, 658.

Southern Division.—Circuit and district courts: Third Mondays in April and October, at Peoria.[1]

SOUTHERN DISTRICT: Circuit and district courts: First Mondays in January and June, at Springfield; first Monday in May, at Danville,[2] and first Monday in September, at Quincy.[3]

District court: First Mondays in March and October, at Cairo.[4]

Indiana.—Circuit and district courts: First Mondays in January and July, at New Albany;[5] first Mondays in April and October, at Evansville;[6] first Tuesdays in May and November, at Indianapolis;[7] second Tuesdays in June and December, at Fort Wayne.[8]

Indian Territory.—The United States district courts are held as follows:

NORTHERN DISTRICT: Vinita, Miami, Tahlequah, Muscogee.

CENTRAL DISTRICT: South McAlester, Atoka, Antlers, and Cameron.

SOUTHERN DISTRICT: Ardmore, Purcell, Pauls Valley, Ryan, and Chickasha.

At least two terms of court must be held each year at each place of holding court in each district at such regular times as the judge for such district shall fix and determine.[9]

Iowa.—NORTHERN DISTRICT: *Cedar Rapids Division.*—Circuit and district courts: First Tuesday in April and second Tuesday in September, at Cedar Rapids.

Eastern Division.—Fourth Tuesday in April and first Tuesday in December, at Dubuque.

Western Division.—Fourth Tuesday in May and first Tuesday in October, at Sioux City.

[1] Act of March 3, 1887, 1 Supp. R. S. 352.

[2] Act of July 2, 1890, 1 Supp. R. S. 764.

[3] Act of Aug. 8, 1888, 1 Supp. R. S. 606.

[4] Rev. Stat. § 572.

[5] Rev. Stat. §§ 572, 658.

[6] Act of June 23, 1874, 1 Supp. R. S. 46.

[7] Rev. Stat. §§ 572, 658.

[8] Act of March 3, 1881, 1 Supp. R. S. 327.

[9] Act of March 1, 1895, 2 Supp. R. S. 392.

Central Division.—Second Tuesday in June and second Tuesday in November, at Fort Dodge.[1]

SOUTHERN DISTRICT: *Western Division*.—Circuit and district courts: Second Tuesday in March and third Tuesday in September, at Council Bluffs.

Eastern Division.—Second Tuesday in April and third Tuesday in October, at Keokuk.

Central Division.—Second Tuesday in May and third Tuesday in November, at Des Moines.[2]

Kansas.—*First Division*.—Circuit court: First Monday in June, at Leavenworth; fourth Monday in November, at Topeka.

District court: Second Monday in April, at Topeka; second Monday in October, at Leavenworth.[3]

Second Division.—Circuit and district courts: Second Monday in March and second Monday in September, at Wichita.[4]

Third Division.—Circuit and district courts: First Monday in May and second Monday in November, at Fort Scott.[5]

Kentucky.—Circuit and district courts: Third Monday in February and first Monday in October, at Louisville; second Monday in May and first Monday in December, at Covington; first Monday in January and second Monday in June, at Frankfort; first Monday in April and third Monday in November, at Paducah;[6] fourth Monday in January and first Monday in June, at Owensboro.[7]

Louisiana.—EASTERN DISTRICT: Circuit court: Fourth Monday in April and first Monday in November, at New Orleans;[8] second Monday in April and second Monday in November, at Baton Rouge.[9]

[1] The district court may name time and place for trial of criminal cases; U. S. *v.* Kessel, 63 Fed. Rep. 433.

[2] Act of Jan. 4, 1896, 29 Stat. L. 2; 2 Supp. R. S. 443.

[3] Rev. Stat. §§ 572, 658.

[4] Act of June 9, 1890, 1 Supp. R. S. 744; Act of March 2, 1895, 2 Supp. R. S. 417.

[5] Act of May 3, 1892, 2 Supp. R. S. 12; Act of March 2, 1895, 2 Supp. R. S. 418.

[6] Act of July 1, 1879, 1 Supp. R. S. 271.

[7] Act of Aug. 8, 1888, 1 Supp. R. S. 607.

[8] Rev. Stat. § 658.

[9] Act of Aug. 13, 1888, 1 Supp. R. S. 615.

District court: Third Mondays in February, May, and November, at New Orleans;[1] second Mondays in April and November, at Baton Rouge.[2]

WESTERN DISTRICT: Circuit and district courts: First Mondays in January and June, at Opelousas; fourth Mondays in January and June, at Alexandria; third Mondays in February and July, at Shreveport; first Mondays in April and October, at Monroe.[3]

Maine.—Circuit court: Twenty-third of April and September, or if the twenty-third falls on Sunday, the twenty-fourth, at Portland.[4]

District court: First Tuesdays in February and December, at Portland; first Tuesday in June, at Bangor;[5] first Tuesday in September, at Bath.[6]

Maryland.—Circuit court: First Mondays in April and November, at Baltimore;[7] second Monday in May and last Monday in September, at Cumberland.[8]

District court: First Tuesdays in March, June, September, and December, at Baltimore;[9] second Monday in May and last Monday in September, at Cumberland.[10]

Massachusetts.—Circuit court: Fifteenth of May and fifteenth of October, at Boston.[11]

District court: Third Tuesday in March, fourth Tuesday in June, second Tuesday in September, and first Tuesday in December, at Boston.[12]

Michigan.—EASTERN DISTRICT: *Southern Division.*—Circuit and district courts: First Tuesdays in March, June, and November, at Detroit;[13] district court only, fourth Mondays in January and June, at Port Huron.[14]

Northern Division.—Circuit and district courts: First Tues-

[1] Rev. Stat. § 572.
[2] Act of Aug. 13, 1888, 1 Supp. R. S. 615.
[3] Act of March 3, 1881, 1 Supp. R. S. 325.
[4] Rev. Stat. § 658.
[5] Act of Jan. 18, 1884, 1 Supp. R. S. 423.
[6] Rev. Stat. § 572.
[7] Rev. Stat. § 658.
[8] Act of March 21, 1892, 2 Supp. R. S. 5.
[9] Rev. Stat. § 572.
[10] Act of March 21, 1892, 2 Supp. R. S. 5.
[11] Rev. Stat. § 658.
[12] Rev. Stat. § 572.
[13] Rev. Stat. § 572.
[14] Act of June 19, 1878, 1 Supp. R. S. 198.

days in May and October, at Bay City.[1] District court special admiralty session in February.[2]

WESTERN DISTRICT: *Southern Division.*—Circuit and district courts: First Tuesdays in March and October, at Grand Rapids.

Northern Division.—Circuit and district courts: First Tuesdays in May and September, at Marquette.[3]

Minnesota.—*First Division.*—Circuit and district courts: First Tuesday in June and first Tuesday in December, at Winona.

Second Division.—Circuit and district courts: Third Tuesday in April and first Tuesday in November, at Mankato.

Third Division.—Circuit and district courts: Fourth Tuesday in June and second Tuesday in January, at St. Paul.

Fourth Division.—Circuit and district courts: First Tuesday in March and first Tuesday in September, at Minneapolis.

Fifth Division.—Circuit and district courts: Second Tuesday in May and second Tuesday in October, at Duluth.

Sixth Division.—Circuit and district courts: Fourth Tuesday in March and fourth Tuesday in September at Fergus Falls.[4]

Mississippi.—NORTHERN DISTRICT: *Eastern Division.*—Circuit and district courts: First Mondays in April and October, at Aberdeen.

Western Division.—Circuit and district courts: First Mondays in June and December, at Oxford.[5]

SOUTHERN DISTRICT: Circuit court, first Mondays in May and November; district court, fourth Mondays in January and June, at Jackson.

Western Division.—Circuit and district courts: First Mondays in January and July, at Vicksburg.[6]

[1] Act of April 30, 1894, 28 Stat. L. 67; 2 Supp. R. S. 181.

[2] Act of Feb. 28, 1887, 1 Supp. R. S. 543.

[3] Act of June 19, 1878, 1 Supp. R. S. 198.

[4] Act of April 26, 1890, 1 Supp. R. S. 719, All criminal offences must be brought and prosecuted in the division in which the offence was committed. Act of July 12, 1894, 2 Supp. R. S. 195.

[5] Act of June 15, 1882, 1 Supp. R. S. 344.

[6] Act of Feb. 28, 1887, 1 Supp. R. S. 547.

Southern Division.—Circuit and district courts: Third Mondays in February and August, at Mississippi City.[1]

Eastern Division.—Circuit and district courts: Second Mondays in March and September, to continue for three weeks, or so long as business may require, at Meridian.[2]

Missouri.—EASTERN DISTRICT: *Eastern Division.*—Circuit court: Third Mondays in March and September, at St. Louis.[3]

District court: First Mondays in May and November, at St. Louis.[4]

Northern Division.—Circuit and district courts: Fourth Monday in May and first Monday in November, at Hannibal.[5]

WESTERN DISTRICT: Circuit and district courts: Fourth Monday in April and first Monday in November, at Kansas City; first Monday in March and third Monday in September, at St. Joseph; first Mondays in April and October, at Springfield; third Mondays in March and October, at Jefferson City.[6]

Montana.—Circuit and district courts: First Mondays in April and November, at Helena.[7]

Southern Division.—First Tuesdays in February and September, at Butte.[8]

Nebraska.—Circuit and district courts: First Monday in May and second Monday in November, at Omaha; third Monday in January and first Monday in October, at Lincoln; third Monday in April, at Hastings; fourth Monday in April, at Norfolk.[9]

Nevada.—Circuit court: Third Monday in March and first Monday in November, at Carson City.[10]

District court: First Mondays in February, May and October, at Carson City.[11]

[1] Act of April 4, 1888, 1 Supp. R. S. 583.

[2] Act of July 18, 1894, 28 Stat. L. 114; 2 Supp. R. S. 202.

[3] Rev. Stat. § 658.

[4] Rev. Stat. § 572.

[5] Act of May 14, 1890, 1 Supp. R. S. 738.

[6] Act of April 19, 1892, 2 Supp. R. S. 10.

[7] Act of Feb. 22, 1889, 1 Supp. R. S. 649.

[8] Act of July 20, 1892, 2 Supp. R. S. 40.

[9] Act of Aug. 3, 1894, 2 Supp. R. S. 222.

[10] Act of Feb. 18, 1876, 1 Supp. R. S. 98.
Rev. Stat. § 658.

New Hampshire.—Circuit court: Eighth day of May, at Portsmouth; last Tuesday in August, at Littleton;[1] eighth day of October, at Concord.[2]

District court: Third Tuesdays in March and September, at Portsmouth;[3] third Tuesdays in June and December, at Concord;[4] last Tuesday in August, at Littleton.[5]

New Jersey.[6]—Circuit court: Fourth Tuesdays in March and September, at Trenton.[7]

District court: Third Tuesdays in January, April, June and September, at Trenton.[8]

New Mexico.—Supreme court: Last Monday in July, at Santa Fe.

First District: District court: First Monday in January and last Monday in May, at Santa Fe.

Second District: District court: First Mondays in March and October, at Albuquerque.

Third District: District court: First Mondays in February and September, at Las Cruces.

Fourth District: District court: First Mondays in April and November, at Las Vegas.

Fifth District: District court: First Mondays in May and December, at Socorro.[9]

New York.—Northern District: Circuit court: Third Tuesday in June, at Canandaigua; third Tuesday in November, at Syracuse; third Tuesday in January, at Albany; adjourned term for civil business only on the third Tuesday in March, at Utica. Also special sessions for motions Tuesday of each week (July and August excepted), at Utica.

District court: Third Tuesday in January, at Albany; third Tuesday in March, at Utica; second Tuesday in May, at Rochester; third Tuesday in September, at

[1] Rev. Stat. § 658.

[2] Act of Feb. 23, 1881, 1 Supp. R. S. 317.

[3] Rev. Stat. § 572.

[4] Act of Feb. 23, 1881, 1 Supp. R. S. 317.

[5] Act of March 10, 1892, 2 Supp. R. S. 4.

[6] Judge upon consent of parties may order cause to be heard or tried at Newark, upon a day set for that purpose. Act of Aug. 8, 1888, 1 Supp. R. S. 607.

[7] Rev. Stat. § 658.

[8] Rev. Stat. § 572.

[9] Act of July 10, 1890, 1 Supp. R. S. 771.

Buffalo; third Tuesday in November, at Auburn; and in the discretion of the judge, one term annually at such time and place within the counties of Onondaga, St. Lawrence, Clinton, Jefferson, Oswego, and Franklin as he may from time to time appoint. Special sessions in admiralty, at Utica, Tuesdays.[1]

SOUTHERN DISTRICT: Circuit court: Last Monday in February, first Monday in April, and third Monday in October; and (criminal only) second Wednesdays in January, March, May, October, and December, and third Wednesday in June, at New York City.[2]

District court: First Tuesday in each month, at New York City.[3]

EASTERN DISTRICT: Circuit and district courts: First Wednesday in every month, at Brooklyn.[4]

North Carolina,—EASTERN DISTRICT: Circuit court: Fourth Monday in May and first Monday in December, at Raleigh; first Monday after the fourth Mondays in April and October, at Wilmington.[5]

District court: Fourth Monday in May and first Monday in December, at Raleigh; first Monday after the fourth Mondays in April and October, at Wilmington; fourth Mondays in April and October, at Newbern; third Mondays in April and October, at Elizabeth City.

WESTERN DISTRICT: Circuit and district courts: First Mondays in April and October, at Greensboro; third Mondays in April and October, at Statesville; first Mondays in May and November, at Asheville,[6] and second Mondays in June and December, at Charlotte.[7]

North Dakota,—Circuit and district courts: First Tuesday in March, at Bismarck; Third Tuesday in May, at Fargo; Second Tuesday in November, at Grand Forks; first Tuesday in July, at Devil's Lake.[8]

[1] Act of March 23, 1882, 1 Supp. R. S. 334.
[2] Rev. Stat. § 658.
[3] Rev. Stat. § 572.
[4] Rev. Stat. §§ 572, 658.
[5] Act of Aug. 9, 1894, 2 Supp. R. S. 234.
[6] Rev. Stat. § 572.
[7] Act of June 19, 1878, 1 Supp. R. S. 196.
[8] Act of Feb. 4, 1895, 2 Supp. R. S. 368.

Ohio.—Northern District: *Eastern Division:* Circuit and district courts: First Tuesdays in January, April, and October, at Cleveland.[1]

Western Division: First Tuesdays in June and December, at Toledo.[2]

Southern District: *Western Division:* Circuit and district courts: First Tuesdays in February, April, and October, at Cincinnati.[3]

Eastern Division: First Tuesdays in June and December, at Columbus.[4]

Oklahoma.—Supreme court: First of January and first of June of each year, at Guthrie.

First district court: Second Monday in September, third Monday in February, Logan County; First Wednesday in November, third Tuesday in April, Lincoln County; fourth Tuesday in November, second Tuesday in May of each year, Payne County.

Second district court: Second Monday in September, Blaine County; third Thursday in September, "D" County; first Monday in October, Day County; second Monday in October, Roger Mills County; third Wednesday in October, "G" County; fifth Tuesday in October, Washita County; third Monday in November, Canadian County.

Third district court: Second Tuesday in September, first Tuesday in May, Pattawatomie County; second Tuesday in October, third Tuesday in February, Oklahoma County; third Tuesday in November, first Tuesday in April, Cleveland County.[5]

Oregon.—Circuit court: Second Monday in April and first Monday in October, at Portland.[6]

District court: First Mondays in March, July and November, at Portland.[7]

[1] Rev. Stat. § 572.

[2] Act of June 8, 1878, 1 Supp. R. S. 172.

[3] Rev. Stat. §§ 572, 658.

[4] Act of Feb. 4, 1880, 1 Supp. R. S. 277.

[5] Act of Dec. 21, 1893, 2 Supp. R. S. 164.

[6] Act of Feb. 18, 1876, 1 Supp. R. S. 98.

[7] Rev. Stat. § 572.

Pennsylvania.[1]—EASTERN DISTRICT: Circuit court: First Mondays in April and October, at Philadelphia.

District court: Third Mondays in February, May, August and November, at Philadelphia.

WESTERN DISTRICT: District court: First Monday in May and third Monday in October, at Pittsburg.

Circuit court: Second Mondays in May and November, at Pittsburg.

District court: Third Monday in June and first Monday in October, at Williamsport.

Circuit court: Third Mondays in June and September, at Williamsport.

District court: First Mondays in March and September, at Scranton.

Circuit court: First Mondays in March and September, at Scranton.[2]

District court: Third Monday in July and second Monday in January, at Erie.

Circuit court: Third Monday in July and second Monday in January, at Erie.[3]

Rhode Island.[4]—Circuit court: June 15 and November 15, at Providence.

District court: First Tuesday in February and first Tuesday in August, at Providence; second Tuesday in May and third Tuesday in October, at Newport.

South Carolina.—Circuit court: First Monday in April, at Charleston; first Mondays in February and August, at Greenville; fourth Monday in November, at Columbia.[5]

District court: First Mondays in January, May, July and October, at Charleston; first Mondays in February and August, at Greenville; and fourth Monday in November, at Columbia.[6]

South Dakota.—Circuit and district courts: First Tuesday in April and third Tuesday in October, at Sioux Falls;

[1] Rev. Stat. §§ 572, 658.

[2] Act of Aug. 5, 1886, 1 Supp. R. S. 515.

[3] Rev. Stat. §§ 572, 658.

[4] Rev. Stat. § 572, 658.

[5] Rev. Stat. § 658, Act of Feb'y 6, 1889, 1 Supp. R. S. 638.

[6] Act of April 26, 1890, 1 Supp. R. S. 718; Act of July 23, 1892, 2 *Ibid.* 46.

first Tuesdays in March and October, at Pierre; first Tuesdays in February and September, at Deadwood;[1] first Tuesday in May and third Tuesday in November, at Aberdeen.[2]

Tennessee.—EASTERN DISTRICT: *Northern Division.*—Circuit and district courts: First Mondays in March and September, at Knoxville.[3]

Southern Division.—Circuit and district courts: First Mondays in April and October, at Chattanooga.[4]

MIDDLE DISTRICT: Circuit and district courts: Third Mondays in April and October, at Nashville.

WESTERN DISTRICT: *Eastern Division.*—Circuit and district courts: First Mondays in April and October, at Jackson.

Western Division.—Circuit and district courts: Fourth Mondays in May and November, at Memphis.[5]

Texas.—EASTERN DISTRICT: Circuit and district courts:—First Mondays in January and September, at Tyler; fourth Mondays in January and September, at Jefferson; third Mondays in February and October, at Galveston; first Monday in April and third Monday in November, at Paris;[6] first Mondays in June and December, at Beaumont.[7]

NORTHERN DISTRICT.—Circuit and district courts: Second Monday in April and third Monday in November, at Waco; second Monday in January and third Monday in May, at Dallas; first Monday in March and third Monday in September, at Fort Worth; third Monday in March and third Monday in October, at Abilene; fourth Monday in March and first Monday in November, at San Angelo.[8]

[1] Act of Aug. 5, 1892, 2 Supp. R. S. 70.

[2] Act of Nov. 6, 1893, 2 Supp. R. S. 151.

[3] Act of Feb. 27, 1896, 29 Stat. L. 39; 2 Supp. R. S. 449.

[4] Act of June 11, 1880, 1 Supp. R. S. 295.

[5] Act of June 20, 1878, 1 Supp. R. S. 203.

[6] Act of April 7, 1892, 2 Supp. R. S. 8.

[7] Act of Feb. 8, 1897, 2 Supp. R. S. 547.

[8] Act of June 11, 1896, 29 Stat. L. 456; 2 Supp. R. S. 527; by this act the terms at Graham were abolished.

WESTERN DISTRICT.—Circuit and district courts: First Mondays in May and November, at San Antonio; first Mondays in April and October, at El Paso; second Monday in June and first Monday in January, at Brownsville; first Mondays in February and July, at Austin.[1]

Utah.—*Central Division.*—Circuit and district courts: first Mondays in May and December, at Salt Lake.[2]

Northern Division.—Circuit and district courts: First Mondays in March and September, at Ogden.

Vermont.—Circuit and district courts; Fourth Tuesday in February, at Burlington; third Tuesday in May, at Windsor; first Tuesday in October, at Rutland.[3]

In each year one of the stated terms of the circuit and district court, may, when adjourned, be adjourned to meet at Montpelier.[4]

Virginia.—EASTERN DISTRICT: Circuit and district courts: First Mondays in April and October, at Richmond; first Mondays in May and November, at Norfolk; first Mondays in July and January, at Alexandria.[5]

WESTERN DISTRICT.—Circuit and district courts: Tuesdays after the second Mondays in April and November, at Danville; Tuesdays after the second Mondays in March and September, at Lynchburg; Tuesdays after the first Mondays in May and October, at Abingdon; Tuesdays after the first Mondays in June and December, at Harrisonburg.[6]

Washington.—*Northern Division.*—Circuit and district courts: First Tuesdays in June and December, at Seattle.

Southern Division.—Circuit and district courts: First Tuesdays in May and November, at Wallawalla.

Eastern Division.—Circuit and district courts: First Tuesdays in April and September, at Spokane Falls.

[1] Act of Feb. 4, 1890, 1 Supp. R. S. 703.

[2] Act of March 2, 1897, 29 Stat. L. 620; 2 Supp. R. S. 576.

[3] Rev. Stat. §§ 572, 658; Act of June 5, 1874, 1 Supp. R. S. 10.

[4] Act of July 3, 1894, 2 Supp. R. S. 193.

[5] Rev. Stat. §§ 572, 658.

[6] Act of Sept. 25, 1890, 1 Supp. R. S. 806.

Western Division.—Circuit and district courts: First Tuesdays in July and February, at Tacoma.[1]

West Virginia—Circuit court: January 10 and June 10, at Parkersburg; April 1 and September 20, at Wheeling; April 15 and October 1, at Clarksburg; May 1 and November 10, at Charleston; October 15, at Martinsburg.

District court: April 1 and September 20, at Wheeling; April 15 and October 1, at Clarksburg; May 1 and November 10, at Charleston; October 15, at Martinsburg.[2]

Wisconsin.—EASTERN DISTRICT: Circuit and district courts: First Mondays in January and October, at Milwaukee; second Tuesday in June, at Oshkosh.[3]

WESTERN DISTRICT: Circuit and district courts: First Tuesday in December, at Madison; first Tuesday in June, at Eau Claire; third Tuesday in September, at La Crosse.[4]

Wyoming.—Circuit and district courts: Second Mondays in May and November, at Cheyenne;[5] first Monday in July, at Evanston.[6] The circuit and districts courts are required to hold one session annually at Sheridan, and may also hold other sessions at any other place in the State of Wyoming, or in the Yellowstone National Park, which is part of the district of Wyoming, at such dates as the courts may order.[7]

EFFECT OF CHANGING TIME OF HOLDING DISTRICT COURTS.—*Sec.* 573. No action, suit, proceeding or process in any district court shall abate or be rendered invalid by reason of any act changing the time of holding such court; but the same shall be deemed to be returnable to, pending and triable in the terms established next after the return day thereof.

[1] Act of April 5, 1890, 1 Supp. R. S. 712.

[2] Act of July 22, 1892, 2 Supp. R. S. 42.

[3] Act of March 31, 1892, 2 Supp. R. S. 5.

[4] The clerk residing at Madison shall attend all terms of said courts at Eau Claire as clerk thereof. Act of Aug. 5, 1886, 1 Supp. R. S. 515.

[5] Act of July 5, 1892, 2 Supp. R. S. 29.

[6] Act of May 23, 1892, 2 Supp. R. S. 22.

[7] Act of May 7, 1894, 2 Supp. R. S. 186.

COURT ALWAYS OPEN AS A COURT OF ADMIRALTY FOR CERTAIN PURPOSES.—*Sec.* 574. The district courts, as courts of admiralty, and as courts of equity so far as equity jurisdiction has been conferred upon them, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. And any district judge may, upon reasonable notice to the parties, make, and direct and award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

DISTRICT COURT IN THE SOUTHERN DISTRICT OF FLORIDA.—*Sec.* 575. The district court for the southern district of Florida shall at all times be open, for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction.

DISTRICT COURTS IN WISCONSIN.—*Sec.* 576. The district courts of the districts of Wisconsin shall at all times be open, for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction, so far as the same can be done without a jury.

DISTRICT COURTS IN KENTUCKY AND INDIANA.—*Sec.* 577. In the districts of Kentucky and Indiana the terms of the district courts shall not be limited to any particular number of days, nor shall it be necessary to adjourn by reason of the intervention of a term of the court elsewhere; but the court intervening may be adjourned over till the business of the court in session is concluded.[1]

ADJOURNMENT IN CRIMINAL CASES.—*Sec.* 578. District courts shall hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases.

ADJOURNED TERMS.—*Sec.* 579. The judge of any district court in Indiana, Kentucky, Louisiana, Michigan, Ohio, Pennsylvania and Texas may adjourn the same from time to time, to meet the necessities or convenience of the business.

ADJOURNED TERMS IN KENTUCKY AND INDIANA.—*Sec.* 580. In

[1] Act of July 1, 1879, 1 Supp. R. S. 271.

the districts of Kentucky and Indiana the intervention of a term of the district court at another place, or of a circuit court, shall not preclude the power to adjourn over to a future day.

SPECIAL TERMS.—*Sec.* 581. A special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge. And any business may be transacted at such special term which might be transacted at a regular term.[1]

TENNESSEE; WHEN CIRCUIT JUDGES MAY ACT AS DISTRICT JUDGES.—*Sec.* 582. In the case of the non-attendance of the district judge of Tennessee at any term of the district court in either of the districts thereof, the circuit justice or circuit judge of the circuit to which such district belongs may hold such term, and shall have and exercise the jurisdiction and powers given by law to a district judge.

ADJOURNMENT IN CASE OF NON-ATTENDANCE OF A JUDGE.—*Sec.* 583. If the judge of any district court is unable to attend at the commencement of any regular, adjourned or special term, the court may be adjourned by the marshal, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct.

THE SAME IN CERTAIN STATES.—*Sec.* 584. If any judge of any district court in Alabama, California, Georgia, Indiana, Iowa, Kentucky, North Carolina, Tennessee or West Virginia is not present at the time for opening the court, the clerk may open and adjourn the court from day to day for four days; and if the judge does not appear by two o'clock after noon of the fourth day, the clerk shall adjourn the court to the next regular term But this section is subject to the provisions of the preceding and next sections.

ADJOURNMENT IN INDIANA AND KENTUCKY.—*Sec.* 585. In the districts of Indiana and Kentucky, the district judge, in the case provided in the preceding section, may, by a written order to the clerk within the first three days of his term, adjourn the district court to a future day within thirty days of the first day. The

[1] This is a consolidation of powers given by § 3 of the judiciary act and other acts relating to particular districts.

clerk shall give notice of such adjournment by posting a copy of said order on the front door of the court house where the court is to be held.

INTERMEDIATE TERMS IN CALIFORNIA, IOWA AND TENNESSEE.—*Sec.* 586. Whenever the judge of any district court in the districts of California, Iowa and Tennessee fails to hold any regular term thereof, it shall be his duty, if it appears that the business of the court requires it, to hold an intermediate term. Such intermediate term shall be appointed by an order under his hand and seal, addressed to the clerk and marshal at least thirty days previous to the time fixed therein for holding it, and the order shall be published the same length of time in the several newspapers published within such districts respectively. And at such intermediate term the business of the court shall have reference to and be proceeded with in the same manner as if it were a regular term.

BUSINESS CERTIFIED TO CIRCUIT COURT IN CASE OF DISABILITY OF DISTRICT JUDGE.—*Sec.* 587. When satisfactory evidence is shown to the circuit judge of any circuit, or, in his absence, to the circuit justice allotted to the circuit, that the judge of any district therein is disabled to hold a district court, and to perform the duties of his office, and an application accordingly is made in writing to such circuit judge or justice, by the district attorney or marshal of the district, the said judge or justice, as the case may be, may issue his order in the nature of a *certiorari*, directed to the clerk of such district court, requiring him forthwith to certify into the next circuit court to be held in said district all suits and processes, civil and criminal, depending in said district court, and undetermined, with all the proceedings thereon, and all the files and papers relating thereto. Said order shall be immediately published in one or more newspapers printed in said district, at least thirty days before the session of such circuit court, and shall be sufficient notification to all concerned; and thereupon the circuit court shall proceed to hear and determine the suits and processes so certified. And all bonds and recognizances taken for, or returnable to, such district court, shall be held to be taken for, and returnable to, said circuit court, and shall have the same effect therein as they could have had in the district court to which they were taken.[1]

[1] See also § 637.

SUITS BROUGHT IN DISTRICT COURT AFTER ORDER TO CERTIFY TO CIRCUIT COURT.—*Sec.* 588. When an order has been made as provided in the preceding section, the clerk of the district court shall continue, during the disability of the district judge, to certify, as aforesaid, all suits, pleas and processes, civil and criminal, thereafter begun in said court, and to transmit them to the circuit court next to be held in that district; and the said court shall proceed to hear and determine them as provided in said section; *provided*, that when the disability of the district judge ceases or is removed, the circuit court shall order all such suits and proceedings then pending and undetermined therein, in which the district courts have an exclusive original cognizance, to be remanded, and the clerk of such court shall transmit the same, with all matters relating thereto, to the district court next to be held in that district; and the same proceedings shall then be had in the district court as would have been had if such suits had originated or been continued therein.

CONSTRUCTION OF THE FOREGOING SECTION.—The language of the statute evidently supposes a district judge in existence to whom the causes may be remanded. It does not direct a *certiorari* on his death, but on his disability. It does not suppose a vacancy, but an incumbency, in the office. The meaning of the statute must be that while there is a judge in office who is disabled to hold a court, his duties shall be performed by the circuit court during the disability. With his death the disability ceases, a vacancy ensues in the office, and a new appointment awakens in full vigor the powers of the district court.[1]

POWERS OF DISTRICT JUDGE VESTED DURING DISABILITY IN CIRCUIT JUDGE.—*Sec.* 589. In the case provided in the two preceding sections, the circuit judge, and in his absence the circuit justice, shall have and exercise, during such disability, all the powers of every kind vested by law in such district judge. But this provision does not require them to hold any special court, or court of admiralty, at any other time than that fixed by law for holding the circuit court in said district.[2]

[1] Story, J., in *Ex parte* U. S., 1 Gallis. 338.

[2] Rev. Stat. § 589. A circuit judge may issue an order to show cause why an injunction should not be granted and a receiver appointed in proceedings in involuntary bankruptcy; and in the absence of proof

PREPARATORY EXAMINATIONS AND ORDERS BY THE CLERK IN ADMIRALTY CASES.—*Sec.* 590. When the business of a district court is certified into the circuit court on account of the disability of the district judge, the district clerk shall be authorized by order of the circuit judge, or, in his absence, of the circuit justice within whose circuit such district is included, to take, during such disability, all examinations and depositions of witnesses, and make all necessary rules and orders, preparatory to the final hearing of all causes of admiralty and maritime jurisdiction.[1]

DISTRICT JUDGE DESIGNATED TO PERFORM DUTIES OF DISABLED JUDGE.—*Sec.* 591. When any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, or of the circuit court in his district, in the absence of the other judges, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to the circuit judge, or, in his absence, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said courts, and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the district clerk to the judge so designated and appointed.[2]

DESIGNATION OF ANOTHER JUDGE IN CASE OF ACCUMULATION OF BUSINESS.—*Sec.* 592. When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to the circuit judge, or, in his absence, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any

the circuit judge is presumed to have acted according to law in issuing the order: Wallace *v.* Loomis, 97 U. S. 146.

[1] As amended by Act of Feb 18., 1875, ch. 80, 18 Stat. L. 317.

[2] This section does not authorize the designation of a judge to hold court in a district in which the office of judge is vacant; 9 A. G. Op. 131.

other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof; and each of the said district judges may, in case of such appointment, hold separately at the same time a district or circuit court in such district, and discharge all the judicial duties of a district judge therein; but no such judge shall hear appeals from the district court.

WHEN DESIGNATION OF ANOTHER JUDGE BY THE CHIEF JUSTICE OF THE UNITED STATES.—*Sec.* 593. If the circuit judge and circuit justice are absent from the circuit, or are unable to execute the provisions of either of the two preceding sections, or if the district judge so designated is disabled or neglects to hold the courts and transact the business for which he is designated, the district clerk shall certify the fact to the Chief Justice of the United States, who may thereupon designate and appoint, in the manner aforesaid, the judge of any district within such circuit or within any circuit next contiguous; and said appointment shall be transmitted to the district clerk, and be acted upon by him as directed in the preceding section.

REVOCATION AND NEW APPOINTMENTS.—*Sec.* 594. The circuit judge or circuit justice, or the Chief Justice, as the case may be, may from time to time, if in his judgment the public interests so require, make a new designation and appointment of any other district judge within the said circuits, for the duties and with the powers mentioned in the three preceding sections, and to revoke any previous designation and appointment.

DUTY OF DISTRICT JUDGE TO COMPLY WITH THE DESIGNATION AND APPOINTMENT.—*Sec.* 595. It shall be the duty of the district judge who is designated and appointed under either of the four preceding sections to discharge all the judicial duties for which he is so appointed, during the continuance of such disability, or, in the case of an accumulation of business, during the time for which he is so appointed; and all the acts and proceeding in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district.

DESIGNATION OF JUDGE WHEN PUBLIC INTEREST REQUIRES IT.—*Sec.* 596. It shall be the duty of every circuit judge, whenever in his judgment the public interest so requires, to designate and

appoint,[1] in the manner and with the powers provided in section five hundred and ninety-one, the district judge of any judicial district within his circuit to hold a district or circuit court in the place or in aid of any other district judge within the same circuit; and it shall be the duty of the district judge so designated and appointed, to hold the district or circuit[2] as aforesaid, without any other compensation than his regular salary as established by law, except in the case provided in the next section.[3]

EXPENSES OF JUDGE DESIGNATED TO SOUTHERN DISTRICT OF NEW YORK.—*Sec.* 597. Whenever a district judge from another district holds a district or circuit court in the southern district of New York, in pursuance of the preceding section, his expenses, not exceeding ten dollars a day, certified by him, shall be paid by the marshal of said district, as a part of the expenses of the court, and shall be allowed in the marshal's account.

DISABILITY OF JUDGES IN FLORIDA.—*Sec.* 598. When a certificate of the judge of either of the districts of Florida, stating that he is disabled to hold any regular, special or adjourned term of the court of such district, and requesting the judge of the other district to hold the same, is filed in the clerk's office of the place where it is to be held, the judge of the other district is authorized to hold such courts, and to exercise all the powers of district judge, in the district of the judge so certifying.

DISABILITY OF JUDGES IN NEW YORK.—*Sec.* 599. Whenever the judge of the northern district of New York is disabled to perform the duties of his office, it shall be the duty of the judge of the southern district, upon receiving from him notice thereof, to hold the district court, and to perform all the duties of district judge for such district. And whenever the judge of the southern district is so disabled, it shall be the duty of the judge of the eastern district, upon a like notice, to hold the district court, and to perform all the duties of district judge for the southern district. In such cases the said judges, respectively, shall have the same powers as are vested in the judge so disabled.

[1] The appointment should be filed in the office of the clerk of the district court: National Home *v.* Butler, 33 Fed. Rep. 374; The Alaska, 35 *id.* 555.

[2] The word court omitted.

[3] Rev. Stat. § 596; so much of this section as forbids the payment of expenses of district judges while holding court outside of their districts is repealed by Act of March 3, 1881, 1 Supp. R. S. 321.

WHEN JUDGE OF EASTERN DISTRICT OF NEW YORK MAY ACT IN SOUTHERN.—*Sec.* 600. Whenever the judge of the southern district of New York deems it desirable, on account of the pressure of public business or other cause, that the judge of the eastern district shall perform the duties of a district judge in the southern district, an order to that effect may be entered upon the records of the district court thereof; and thereupon the judge of the eastern district shall have power to hold the district court, and to perform all the duties of district judge for the southern district.

WHEN A JUDGE IS INTERESTED IN A SUIT PENDING BEFORE HIM. —*Sec.* 601. Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court, and also an order that an authenticated copy thereof, with all the proceedings in the suit, shall be forthwith certified to the next circuit court for the district; and if there be no circuit court therein, to the next circuit court in the state; and if there be no circuit court in the state, to the next convenient circuit court in an adjoining state; and the circuit court shall, upon the filing of such record with its clerk, take cognizance of and proceed to hear the case, in like manner as if it had originally and rightfully been commenced therein.[1]

CONTINUANCES BY VACANCY IN OFFICE OF THE JUDGE.—*Sec.* 602. When the office of judge of any district court is vacant, all process, pleadings and proceedings pending before such court shall be continued of course until the next stated term after the appointment and qualification of his successor; except when such first-mentioned term is held as provided in the next section.

VACANCY IN OFFICE OF DISTRICT JUDGE.—*Sec.* 603. When the office of district judge is vacant in any district in a state containing two or more districts, the judge of the other or of either of

[1] See also § 637; the fact that the district judge has been counsel for one of the parties in a different suit is no ground for challenge, at least in the absence of a motion to remove: The Richmond, 9 Fed. Rep. 863; in Spencer *v.* Lapsley, 20 How. 264, an interested judge of the district court was held to have power to make an order of removal to the circuit court.

the other districts may hold the district court, or the circuit court in case of the sickness or absence of the other judges thereof, in the district where the vacancy occurs, and discharge all the judicial duties of judge of such district during such vacancy; and all the acts and proceedings in said courts, by or before such judge of an adjoining district, shall have the same effect and validity as if done by or before a judge appointed for such district.[1]

[1] The Act of 1789 related only to a vacancy caused by the death of a judge; and the exception at the end of § 602 is here added, being made necessary by the act of 1861, which forms the basis of § 603; the judiciary act provided only for vacancy by death; the act of 1861 provided for vacancies, by death or resignation, only in states containing two districts, and provided no means of information upon which the judge of one district in a state should proceed to hold a court in the other.

CHAPTER V.

JURISDICTION OF THE DISTRICT COURTS.

Jurisdiction, Special and Limited.

§ 35. Having treated of the organization and constitution of the district courts and of the terms and sessions thereof, we will now proceed to consider their jurisdiction and point out some of the general rules of practice and procedure therein. The jurisdiction of these courts is less varied and extensive than that of the circuit courts, and it has remained substantially the same ever since their original institution; whereas the jurisdiction of the circuit courts has been much enlarged within the last few years, and especially by the liberal provisions of statutes for the removal of causes thereto from the state courts. The business of the district courts is mainly limited to the cognizance of certain crimes and offences under the laws of the United States, to proceedings for the recovery of penalties and forfeitures, and to matters of admiralty and maritime jurisdiction. The criminal jurisdiction of these courts is limited to offences which are expressly made such by the statutes of the United States; and they have, in a strict sense, no common law jurisdiction of crimes, or jurisdiction of the crimes known to the common law, unless such jurisdiction is conferred by some act of Congress.[1] They

[1] United States *v.* Barney, 5 Blatch. 294; Wilson's Case, 3 *id.* 435; Godfrey's Case, 17 Johns. 225; the rule is applicable to all United States Courts. If Congress has not declared an act done to be a crime against the United States the courts have no power to treat it as such. U. S. *v.* Reese, 92 U. S. 216: Before an offence can become cognizable in the Circuit Court, Congress must first define or recognize it as such, affix a punishment to it, and confer jurisdiction upon some court to try the offender. U. S. *v.* Hall, 98 U. S. 345; U. S. *v.* Britton, 108 *id.* 206; U. S. *v.* Eaton, 144 *id.* 677.

So strict have the courts been in adhering to this rule that they would not take jurisdiction of offences not defined by statutes that were virtually or consequentially included in others

have power to punish, by fine or imprisonment, contempts of their authority, in cases of the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree or command of the court.[1] They have general admiralty and maritime jurisdiction, and in the exercise thereof they are only subject to, and controlled by, the general principles of admiralty and maritime jurisprudence, unless otherwise provided by statute law, which we shall hereafter consider.[2]

that were defined. In United States *v.* Ramsey, Hemp. C. C., 481, the court quashed an indictment against Ramsey for being accessory to the killing of a man in the Indian country, holding that there was no law to punish him for this, although there was for the punishment of the crime of murder.

See also U. S. *v.* Terrell, Hemp. C. C., 411 and 422, and U. S. *v.* Albuty, Hemp. C. C., 444. See also Kent Com. 332 *seq.*; Spear Fed. Jud. 223, 667 *seq.*; Whart. Comm. Am. Law, 524; Whart. Cr. Law (8th ed.), 254; Cooley, Const. Lim., 19, 20; United States *v.* Hudson, 7 Cr. 32; United States *v.* Cooledge, 1 Wh. 415; United States *v.* Bevans, 3 Wh. 336.

[1] Rev. Stat. § 725. As to the power of punishing for contempt in the presence of the court, see *Ex p.* Terry, 128 U. S. 289; Eilenbecker *v.* District Court, 134 *id.* 31. Misbehavior in any place set apart for use of court, as jury and witness rooms, hallways, etc., is in the presence of the court: *Ex p.* Savin, 131 *id.* 207. The exercise of this power by courts of general jurisdiction is not subject to review by writ of error or appeal to the Supreme Court, yet when a court of the United States undertakes by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make, the order itself being without jurisdiction is void; and the order punishing for contempt is equally void. When the proceeding for contempt in such case results in imprisonment, the Supreme Court will, by its writ of *habeas corpus*, discharge the prisoner. *Ex p.* Fisk, 113 U. S. 713; *Ex p.* Ayers, 123 *id.* 443; *Ex p.* Sawyer, 124 *id.* 200: Interference with receivers may constitute contempt. Am. Const. Co. *v.* Jacksonville, etc., Co., 52 Fed. Rep. 937; *Re.* Acker, 66 *id.* 290; *Re.* Phelan, 62 *id.* 803; U. S. *v.* Jose, 63 *id.* 951: Although the act may constitute a crime, yet if it be also a contempt the court may punish it as such: U. S. *v.* Debs, 64 *id.* 724.

[2] The jurisdiction of District Courts in civil cases as conferred by the 18 clauses of Rev. Stat. § 563, and several subsequent acts of Congress, is discussed in the ensuing pages. It is summarized as follows in Foster's Fed. Pr. § 25:

Suits for penalties and forfeitures incurred under any law of the United States; suits at common law brought

Jurisdiction of Crimes and Offences.

§ 36. In relation to the jurisdiction of the district courts of crimes and offences, the statute provides that they shall have jurisdiction "of all crimes and offences cognizable under the authority of the United States, committed within their respective districts, or upon the high seas,[1] the punishment of which is not capital, except in the cases mentioned in section 5412, title CRIMES."[2]

In cases where the punishment is capital, and in those cases

by the United States or any officer thereof, authorized by law to sue; suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title, or interest; suits for the recovery of any forfeiture or damages under Section 3490 of the Revised Statutes; causes of action arising under the postal laws of the United States; civil causes of admiralty and maritime jurisdiction, and all seizures on land and water, not within admiralty and maritime jurisdiction; prizes on land and water; suits brought by the assignees of debentures for drawback of duties to enforce such debentures; all suits under the civil rights law; suits to recover possession of any office except that of presidential elector or a legislative office, wherein the sole question touching the title to such office arises out of the denial of the right of a citizen to vote on account of race, color, or previous condition of servitude; proceedings by *quo warranto*, prosecuted by a district attorney of the United States, for the removal from office of a person disqualified by the Fourteenth Amendment to the Constitution; suits by aliens for *torts* only in violation of the law of nations or of a treaty of the United States; suits against consuls or vice consuls; and all matters and proceedings in bankruptcy; suits against the United States to collect claims not exceeding one thousand dollars for money only, founded upon the Constitution of the United States or of any law of Congress, except for pensions, upon any contract expressed or implied with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding *in tort*, in respect of which claims the plaintiff would be entitled to redress against the United States in a court of law, equity or admiralty, if the United States were suable, except war claims which, before March 3, 1887, were rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same; and proceedings to condemn for national public purposes land situated within their respective districts. Foster's Fed. Pr., (1st ed.) § 25.

[1] The great lakes are "high seas:" U. S. *v.* Rodgers, 150 U. S. 249.

[2] Rev. Stat. § 563, sub. 1. The district court of Alaska has jurisdiction to declare forfeiture of vessel for taking fur seal in violation of Rev. Stat. § 1956: *Ex p.* Cooper, 143 U. S. 472. The federal courts have no jurisdiction of crimes committed by one Indian against another in Indian Territory: Smith *v.* U. S., 151 U. S. 50.

embraced in section 5412 of the Revised Statutes, the circuit courts have exclusive jurisdiction, and in all other cases of crimes and offences the district courts have jurisdiction concurrent with the circuit courts.[1]

The jurisdiction thus conferred on the federal courts in criminal cases is exclusive of any jurisdiction of the courts of the several states. The state courts cannot, consistently with the Constitution of the United States, exercise jurisdiction of offences against the laws of the United States; nor can such jurisdiction be delegated to them.[2] Nor can the state tribunals or its judges in any manner interfere with the exercise of the jurisdiction of the district courts in criminal cases, by *habeas corpus* or otherwise; nor can the validity of the proceedings of such courts be in any manner reviewed or called in question by any state court or judge thereof.[3]

In Cases of Piracy, Penalties and Forfeitures.

§ 37. The district courts have jurisdiction of all cases arising under any statute of the United States for the punishment of piracy, when there is no circuit court held in the district of such court;[4] and of all suits for penalties and forfeitures incurred under any law of the United States.[5] But we have already noticed that the circuit courts have concurrent jurisdiction of all crimes and offences cognizable in the district courts, which we shall hereafter more particularly consider.[6]

Suits by the United States or Officers; Limitation of Suits.

§ 38. It is a familiar doctrine of the law that a sovereign cannot be sued in his own court without his consent. This doctrine is applicable to the United States as a sovereign authority, and not until the creation of a court by an act of Congress, known

[1] Rev. Stat. § 629, sub. 20.

[2] United States *v.* Holliday, 3 Wall. 407; Stearns *v.* United States, 2 Paine (C. C.) 300.

[3] Ableman *v.* Booth, 21 How. 507. State courts cannot, nor can State legislatures, interfere with proceedings or judgments in federal courts: Hyde *v.* Stone, 20 How. 170; Wallace *v.* M'Connell, 13 Pet. 136; McKim *v.* Voorhies, 7 Cr. 279; U. S. *v.* Peters, 5 *id.* 115.

[4] Rev. Stat. § 563, sub. 2; The Palmyra, 12 Wheat. 1.

[5] Rev. Stat. § 563, sub. 3; Hall *v.* Warren, 2 McLean, 332; Ketland *v.* The Cassius, 2 Dall. 365; *In re* Leszynsky, 16 Blatch. 14; Lees *v.* U. S., 150 U. S. 476.

[6] Rev. Stat. § 629, sub. 20.

as the Court of Claims, and the giving to it cognizance of certain causes of action against the United States, of which we shall treat hereafter, could the government be sued in the federal courts.[1] But the statute gives the district courts jurisdiction "of suits at common law brought by the United States, or by any officer thereof authorized by law to sue."[2]

The jurisdiction thus conferred upon the district courts is, however, not exclusive; but the United States, as a body corporate and sovereign authority, may institute suits, like other corporate bodies, in any court of any state in the Union; and in this respect she has the same rights and is entitled to the same remedies as natural persons.[3] She may maintain a suit at common law in assumpsit or trespass; and if the suit is to recover on negotiable paper, she possesses the same rights and incurs the same liabilities as natural persons under similar circumstances.[4] The United States may bring suit to vacate patents for inventions.[5] It may bring a bill to enjoin and restrain obstructions to highways used in inter-state commerce and in the transportation of the mail.[6]

Suits in Equity to Enforce Internal Revenue Taxes.

§ 39. The district courts have, also, jurisdiction "of all suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in

[1] The district courts have concurrent jurisdiction with Court of Claims in all claims founded upon the Constitution or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government, or for damages, liquidated or unliquidated, in cases not sounding in tort, where the amount of the claim does not exceed one thousand dollars: Act of March 3, 1887, 1 Supp. R. S. 559.

[2] Rev. Stat. § 563, sub. 4. As to "common law," used in this clause, see Parsons *v.* Bedford, 3 Pet. 443; Duncan *v.* U. S., 7 *id.* 435. The same jurisdiction is also conferred by statute upon the circuit courts: Rev. Stat. § 629, sub. 3.

[3] Dugan *v.* United States, 3 Wh. 172; Cotton *v.* United States, 11 How. 229. And is bound by the principles which govern individuals; U. S. *v.* Ingate, 48 Fed. Rep. 251.

[4] United States *v.* Bank, 15 Pet. 377; United States *v.* Gear, 3 How. 120; United States *v.* Dunn, 6 Pet. 51; The Floyd Acceptances, 7 Wall. 666.

[5] U. S. *v.* Bell Telephone Co., 128 U. S. 315.

[6] *Re* Debs, 158 U. S. 564.

which he has any right, title or interest;"[1] and "of all suits for the recovery of any forfeiture or damages under section thirty-four hundred and ninety" of the Revised Statutes, and all such suits may be tried and determined by any district court within whose jurisdictional limits the defendant may be found.[2] And in all cases where a cause of action arises under the postal laws of the United States, they have concurrent jurisdiction with the circuit courts.[3]

Admiralty and Prize Causes.

§ 40. The most important function of the district courts, however, is that which relates to their admiralty and maritime jurisdiction. The great extent of our sea-coast, and the magnitude of our shipping interests both coast-wise and foreign, naturally cause frequent and important controversies of an admiralty and maritime character, and the jurisdiction of these courts is frequently invoked in such cases. Their original admiralty and maritime jurisdiction is, with few exceptions, exclusive of all other federal courts, and in all cases exclusive of the state tribunals.[4] On this subject the statute provides that these courts shall have jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts."[5] Exclusive cognizance is also given to the district courts of all prizes brought into the United States, except prizes taken in pursuance of the provisions of the statute authorizing the confiscation of property employed in aid of any insurrection against the government of the United States, in which cases the circuit

[1] Rev. Stat. § 563, sub. 5.

[2] Rev. Stat. § 563, sub. 6.

[3] Rev. Stat. § 563, sub. 7; *Ibid.* § 629.

[4] The Moses Taylor, 4 Wall. 411; The Hine, 4 Wall. 555; The Steamboat Co. *v.* Chase, 16 Wall. 529; The St. Lawrence, 1 Black 526; The Isabella, 1 Brown's Ad. 96; Railroad Co. *v.* Whitton, 13 Wall. 270; Jansen *v.* The Magdalena, Bee 11. They are governed solely by the legislation of Congress and the general principles of the maritime law, and are not bound by State statutes: New Zealand Insurance Co. *v.* Earnmoor S. S. Co., 79 Fed. Rep. 368.

[5] Rev. Stat. § 563, sub. 8.

courts have also concurrent jurisdiction.[1] The jurisdiction of the federal courts in prize causes is necessarily exclusive of any authority or cognizance by the state courts, as all such controversies must arise under the Constitution and laws of the United States.[2]

General Principles relating to Admiralty.

§ 41. It does not come within the scope of this treatise to treat fully of the doctrines and principles of admiralty and maritime law.[3] It will be mainly our purpose to notice those changes and modifications of the general doctrines and principles, by statutes and rules of the federal courts and the practice therein.

The jurdisdiction of courts in admiralty rests upon two broad grounds, one the subject-matter of contracts, the other locality, in torts. To give jurisdiction in case of contract, it is necessary that the contract be of a maritime character, as understood and interpreted in the admiralty; such as a contract to carry merchandise or passengers on the high seas or navigable waters;[4] or for seamen's wages;[5] or for the pilot's services;[6] or for material or supplies furnished in a foreign port, and the like.[7]

But contracts for material or supplies furnished in the original construction of a vessel are not maritime contracts.[8] And where

[1] Rev. Stat. § 563, sub. 8, 9, and amendment, February 18, 1875; Rev. Stat. § 629, sub. 6, Rev. Stat. §§ 5308, 5309.

[2] Rev. Stat. § 711, sub. 2, 4; United States *v.* Lathrop, 17 Johns. 4; Jackson *v.* Rose, 2 Va. Cas. 34; Ordway *v.* Central National Bank, 47 Md. 217; Blitz *v.* Columbia National Bank, 87 Pa. 87. See *contra* in state courts, Ely *v.* Peck, 7 Conn. 239; M. R. Telegraph Co. *v.* First National Bank, 74 Ill. 217.

[3] For the doctrines and principles of admiralty and maritime law as understood and enforced in the United States, and the jurisdiction of the courts as to the same, see The Hine *v.* Trevor, 4 Wall. 555; The Lottawanna, 21 *id.* 558; The Scotland 105, U. S. 24; Liverpool *v.* Phœnix Ins. Co. 129, *id.* 397; Butler *v* Boston Steamship Co., 130 *id.* 527; The Eclipse, 135 *id.* 599. The law of limited liability is part of the maritime law of the United States: *Re* Garnett, 141 U. S. 1.

[4] The Moses Taylor, 4 Wall. 411; Moorewood *v.* Enequist, 23 How. 491.

[5] Sheppard *v.* Taylor, 5 Pet. 675; The Gazelle, 1 Sprague 378.

[6] Hobart *v.* Drogan, 10 Pet. 108; *Ex parte* McNiel, 13 Wall. 236.

[7] The Robert Fulton, 1 Paine 620; The St. Lawrence, 1 Black 522; The General Smith, 4 Wh. 433; Zane *v.* The President, 4 Wash. 453.

[8] People's Ferry Company *v.* Beers, 20 How. 393; Roach *v.* Chapman, 22 *id.* 129; Edwards *v.* Elliott, 21 Wall. 532; The Revenue Cutter, 4 Saw. 143.

two parties joined in an adventure, in which one was to contribute his skill, labor and experience, and the other was to furnish a vessel, and each was to have a certain portion of the profits, this was held not to be a maritime contract that could confer admiralty jurisdiction upon the court.[1] And it may be observed, generally, that the admiralty has no jurisdiction at all in mere matters of account between the part owners of vessels, although they may relate purely to maritime affairs.[2]

Maritime Liens.

§ 42. The jurisdiction of the district courts in admiralty is frequently exercised for the purpose of enforcing liens created by virtue of maritime contracts. These courts have jurisdiction "of all causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." But the common law courts and remedies afford no means of enforcing maritime liens. The Constitution of the United States and acts of Congress have vested the admiralty and maritime powers exclusively in the federal courts of the United States, and hence no state has authority to constitute courts with these powers; and the common law remedies are not applicable to the enforcement of liens by proceedings *in rem*.[3] The provision, therefore, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it," can give state or federal courts, as courts of law, jurisdiction only of suits on maritime contracts, where the proceedings for the non-fulfillment of such contracts are *in personam*, and where the libellant is willing to waive the lien.[4] But in such proceedings the party is entitled to the benefit of the laws of the state relating to attachments to secure his claim, under the same circumstances as other suitors in the courts.[5] A contract to build a ship, or to furnish materials for

[1] Ward *v.* Thompson, 22 How. 330; Steamboat Orleans, 11 Pet. 175.

[2] *Ibid.* See also Davis *v.* Child, 2 Ware 78; Atkyns *v.* Burrows, 1 Pet. Ad. 244; Kellum *v.* Emerson, 2 Curt. 79; Hazard *v.* Howland, 2 Sprague 68; Grant *v.* Poillon, 20 How. 163; Daily *v.* Doe, 3 Fed. Rep. 903; The H. E. Willard, 52 *id.* 387; s. c. 53 *id.* 599.

[3] Brown *v.* Gray, 24 N. Y. S. 61.

[4] McCaffrey *v.* The J. G. Chapman, 62 Fed. Rep 939.

[5] The Belfast, 7 Wall. 624: The Lottawanna, 21 *id.* 558; The Hine *v.* Trevor, 4 *id.* 555; s. c., 17 *id.* 349.

this purpose, is not a maritime contract;[1] but the legislatures of the state may create liens on such contracts and provide means for their enforcement, as this would not be inconsistent with the admiralty jurisdiction of the district courts of the United States or amount to a regulation of commerce.[2]

What Liens by Contract will be Enforced.

§ 43. Among the liens growing out of contracts, which may be enforced on the admiralty side of the court, we may mention the liens which exist in favor of shippers, upon the vessels employed in the transportation of their goods and merchandise. The lien exists as security for the proper fulfillment of the contract of affreightment, which usually binds the carrier to duly transport, safely keep and properly deliver the goods and merchandise described in the contract.[3] A lien also exists in favor of material-men, in certain cases, as security for the price or value of material furnished.[4] By the general principles of admiralty law, jurisdiction did not attach to contracts in favor of material-men for materials furnished in the original construction of vessels, or for materials or supplies furnished thereafter in a home port.[5]

[1] Johnson, etc., Company *v.* The Paradox, 61 Fed. Rep. 860. A contract to finish a vessel which has been launched and named, but left uncompleted by her builders, is a maritime contract: Lake *v.* The Manhattan, etc., 46 Fed. Rep. 797. So a contract to launch a vessel: Frame *v.* The Ella, 48 *id.* 569. Premiums for marine insurance have no lien: Sun Ins. Co. *v.* The Hope, 49 *id.* 279. A contract to procure insurance is not a maritime contract: Marquardt *v.* French, 53 *id.* 603; Williams *v.* Providence, etc., Co., 56 *id.* 159. A contract to advertise steamboat excursions is not a maritime contract: Turner *v.* The Havana 54 *id.* 201. Money loaned to owners is not a lien: U. S. *v.* The Haytian Republic, 65 *id.* 120; Hard *v.* The Advance, 63 *id.* 142.

[2] Edwards *v.* Elliott, 21 Wall. 532; s. c., 34 N. J. 96; The St. Lawrence, 1 Black 522; The Chusan, 2 Story, 456. A most interesting and satisfactory discussion of this subject will be found in the opinion of Chief Justice Watkins in Merrick *v.* Avery, 14 Ark. 370. See also The Victorian, 32 Pac. Rep. 1040; Atlantic Works *v.* Tug Glide, 34 N. E. Rep. 258; Portland Butchering Co. *v.* The Willapa, 34 Pac. Rep. 689.

[3] The Queen of the Pacific, 61 Fed. Rep. 213.

[4] The Belfast, 7 Wall. 624; The Maggie Hammond, 9 *id.* 435; The Bird of Paradise, 5 *id.* 545; The Eddy, 4 *id.* 1. There is no maritime lien for repairs, where they are furnished without any emergency: Hoffman *v.* The Nebraska, 61 Fed. Rep. 514.

[5] Ammon *v.* The Vigilancia, 58 Fed.

But it is generally conceded that Congress has power to extend the jurisdiction of the federal courts to such cases, although it has not, nor has any state, power to limit the jurisdiction of the federal courts in admiralty.[1] The question was presented to the Supreme Court, whether the liens of material-men, created by the laws of a state, can be enforced in admiralty in the district courts of the United States. The court determined that Congress might, under the power to regulate commerce, authorize liens in such cases, and that such legislation would supersede any state legislation on the subject, and that in the absence of such action on the part of Congress the states might make valid laws on the subject, which would be enforced by the federal courts in the exercise of their admiralty jurisdiction, although authority could not be conferred upon the state courts for this purpose.[2]

Suits by Material-men.

§ 44. The general doctrine in admiralty is that a party furnishing necessary supplies or repairs to a ship in a foreign port may enforce a lien therefor on the ship in a court of admiralty jurisdiction by a proceeding *in rem*, or that he may waive his right to a lien and proceed, as we have seen, against the master or owner *in personam*.[3]

Under a rule in admiralty in this country the doctrine has been

Rep. 698. As to what is the home port of a chartered vessel, see Pittman *v.* The Samuel Marshall, 4 C. C. Ap. 385; s. c. 6 U. S. App. 389. *Cf.* DeLano *v.* The Alvira, 63 Fed. Rep. 144.

[1] The Lottawanna, 21 Wall. 558.

[2] The Lottawanna, 21 Wall. 558; Edwards *v.* Elliott, 21 Wall. 532. See also The St. Lawrence, 1 Black 522; The Richard Busteed, 1 Sprague 441; Weaver *v.* The Owens, 1 Wall. Jr., 359; The Samuel Strong, 6 McLean 587; The General Smith, 4 Wh. 438; The Maggie Hammond, 9 Wall. 435; Haritwen *v.* The Louis Olsen, 52 Fed. Rep. 652. The lien will not be enforced unless the supplies were furnished on the credit of the vessel: Harmon Lumber Co. *v.* Lighters Nos. 27 and 28, 57 *id.* 664; s. c. 6 C. C. Ap. 493; Empire Warehouse Co. *v.* The Advance, 60 Fed. Rep. 766.

[3] The Aurora, 1 Wh. 96; The General Smith, 4 *id.* 438; The Robert Fulton, 1 Paine 620; The Ship Virgin, 8 Pet. 538; The Patapsco, 13 Wall. 329; The Brig Nestor, 1 Sum. 73; Andrews *v.* Wall, 3 How. 568; Davis *v.* Child, 2 Ware 78; Young *v.* The Kendal, 56 Fed. Rep. 237. If the work be done by order of owner a lien by agreement must be shown: Herreshoff *v.* The Now Then, 55 Fed. Rep. 523.

extended so as to allow the enforcement of a lien "in all suits by material-men for supplies or repairs or other necessaries; and in such cases the libellant may proceed against the ship and freight *in rem*, or against the master or owner *in personam*."[1]

But under this rule it has been held that in every case of a contract for supplies to a vessel, whether domestic or foreign, being a maritime contract, process *in rem* against the vessel, or *in personam* against the master or owner, may, at the option of the libellant, be resorted to where it is necessary to enforce the contract.[2] In the admiralty and maritime law of the United States the following propositions are established by the decisions of the Supreme Court:

For necessary repair or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty.

For repairs or supplies in the home port of the vessel no lien exists or can be enforced in admiralty, under the general law independently of local statute.

Whenever the statute of a state gives a lien, to be enforced by process *in rem* against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States. This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty.

In the admiralty courts of the United States, a lien upon a vessel for necessary supplies and repairs in her home port, given by the statute of a state, and to be enforced by proceedings *in rem* in the nature of admiralty process, takes precedence of a prior mortgage, recorded under section 4192 of the Revised Statutes.[3]

The party thus entitled to a lien may, as we have seen, waive it, and this may be done expressly or it may be presumed from acts and circumstances. If it is manifest from the facts of the

[1] Adm. Rule 12, adopted May 6, 1872.

[2] The Steamship Circassian, 11 Blatch. 473; 12 Am. Law Reg. 291.

[3] The J. E. Rumbell, 148 U. S. 1.

case that the material-man waived the lien and depended upon the personal responsibility of the master or owner of the ship, the lien would, at least as to the intervening rights of innocent third parties, be treated as waived.[1] Where a promissory note was given for the debt incurred for supplies, it was held that a suit to enforce a lien for them could not be maintained if the note was not tendered or given up and surrendered to the defendant at or before the hearing.[2] This right, however, to enforce the lien has been held to exist where a bottomry bond in part void was executed therefor in the foreign port where the supplies and material were furnished.[3]

The giving of credit for necessary supplies does not ordinarily extinguish the lien therefor, nor does the permission of the ship to depart on her voyage without payment.[4] The material-man generally has, by the maritime law, a threefold remedy, even where a lien exists: first, against the vessel *in rem;* second, against the owners; third, against the master; and neither remedy will be considered as waived or displaced except where it is shown that the credit was given exclusively to or on account of one of the others.[5]

The district courts of the United States can also properly take cognizance of a lien which exists by the maritime law of other nations, and enforce it here as a matter of comity, although all the parties to the suit be foreigners.[6]

In all cases, however, of a claim of a lien for supplies or material furnished to a ship in a foreign port, it seems necessary to show that the supplies or material were necessary to enable the ship to complete her voyage.[7] And if it can be reasonably presumed

[1] Jones *v.* The Half Moon, 46 Fed. Rep. 812.

[2] Ramsey *v.* Allege, 12 Wh. 611. A note does not discharge the lien, unless the parties so agree at the time: The John C. Fisher, 50 Fed. Rep. 703; The D. B. Steelman, 48 *id.* 580; Edicott *v.* The James T. Easton, 49 *id.* 656; Am. Towing, etc., Co. *v.* The Alfred J. Murray, 60 *id.* 926.

The Ship Virgin, 8 Pet. 538.

[4] Moore *v.* The Lime Rock, 49 Fed. Rep. 383. Forfeiture of a vessel for smuggling cuts off a lien for supplies furnished prior to the cause of forfeiture: U. S. *v.* Haytian Republic, 65 Fed. Rep. 120.

[5] The Marion, 1 Story 68; The Nestor, 1 Sum. 73.

[6] The Maggie Hammond, 9 Wall. 435; The Schooner Marion, 1 Story 68.

[7] Claims for wharfage are cognizable in admiralty: *Ex p.* Easton, 95 U. S. 68; Morgan Iron Works *v.* The Alliance, 56 Fed. Rep. 609; Empire Warehouse Co. *v.* The Advance, 60 *id.* 766.

that the master had funds or that the owner had credit, this has been held to be sufficient to displace the lien. But when the lien is reasonably established, it would evidently require strong circumstances of confederation on the part of the material-man with the master, amounting to a fraud, in order to displace the lien on that ground and defeat a suit for its enforcement.[1] But the lien should be enforced within a reasonable time after the debt becomes due, or it will not avail against a *bonâ fide* purchaser without notice.[2]

Maritime Hypothecation.

§ 45. According to the doctrines of admiralty and maritime jurisprudence, the master or owner may hypothecate the ship in a foreign port to procure funds for necessary repairs so as to enable her to proceed and complete the contemplated voyage. This is usually effected by what is denominated a bottomry bond, as the advancement is made on the faith or security of the bottom of the ship.[3] But such bond, if made by the master, is void unless the advances are necessary to effectuate the objects of the voyage or the safety of the ship, and also where the supplies or repairs could have been procured on the owner's credit or with his funds at the place where they were furnished. And in order to recover on such bond it is usually necessary for the libellant to furnish satisfactory evidence that the money was advanced after due inquiry and reasonable grounds of belief that the repairs or supplies were necessary and that the owner was without credit or funds in the foreign port.[4]

The master has the power to hypothecate his ship, even after the original voyage has been broken up by capture and the compulsory sale of her cargo, if she is in a foreign port and repairs or supplies are necessary to enable her to return to the home port.[5]

[1] The Patapsco, 13 Wall. 329; Pritchard & Co. *v.* The Lady Horatio, Bee's Adm. 167.

[2] The Barque Chusan, 2 Sum. 456.

[3] Seldon *v.* Hendrickson, 1 Brock. C. C. 396; Carrington *v.* Pratt, 18 How. 67. See also *post*, § 46.

[4] The Grapeshot, 9 Wall. 129; The Lulee, 10 *id.* 192; The Patapsco, 13 *id.* 329; The Neversink, 5 Blatch. 539; The John and Alice, 1 Wash. 293; The Aurora, 1 Wh. 96; The Fortitude, 3 Sum. 234; The Virgin, 8 Pet. 554; Dixon *v.* The Bellevue, 47 Fed. Rep. 86.

[5] Crawford *v.* The William Penn, 3 Wash. 484.

The general doctrine in admiralty is that the court has jurisdiction in cases of actions for supplies or material furnished, only where they are furnished to a foreign vessel.[1] But supplies or materials furnished in one state to a vessel belonging to another state are considered as furnished to a foreign vessel lying in a foreign jurisdiction, the different states being for this purpose regarded as foreign to each other.[2]

Suits on Bottomry Bonds.

§ 46. Suits on bottomry bonds, properly so called must be *in rem* only, against the property hypothecated, or the proceeds of such property in whosoever hands they may be found, unless the bond was given without authority by the master, or by his fraud or misconduct he has avoided the same or has subtracted the property, or unless the owner has by his own misconduct or wrong lost or subtracted the property, in which latter cases the suits may be *in personam* against the wrong-doer.[3] And an assignee of the bond may either sue in his own name on the bond or he may sue in the name of the assignor;[4] and the court will entertain jurisdiction of a suit on such a bond executed in a foreign country, and between subjects of a foreign country, where the ship is within the territory of the United States.[5]

Suits for Salvage.

§ 47. In suits for salvage the proceedings may be *in rem* against the property saved or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service was performed.[6] The libel may be filed in

[1] The Jerusalem, 2 Gall. 349; Burk *v.* The Brig M. P. Rich, 1 Cliff. 308; The Nestor, 1 Sum. 73; The Sandwich, 1 Pet. Ad. 233. And also as to services rendered: Norton *v.* Switzer, 93 U. S. 365.

[2] The Chusan, 2 Story 455; Magee *v.* Lyndhurst, 48 Fed. Rep. 839; Whitlock *v.* The Thales, 20 How. Pr. 447; The Charles Mears, Newb. 197; The Nestor, 1 Sum. 73.

[3] Adm. Rule 18.

[4] Burk *v.* The M. P. Rich, 1 Cliff. 308.

[5] The Jerusalem, 2 Gall. 190; The Packet, 3 Mas. 255.

[6] Adm. Rule 19; McGinnis *v.* Pontiac, 5 McLean 359; The Centurion, Ware 447. Suit by one salvor against a fund already awarded to another salvor cannot be maintained; Sheldrake *v.* The Chatfield, 52 Fed. Rep. 495; salvor may sue co-salvor in admiralty to recover his share of salvage: McMullin *v.* Blackburn, 59 Fed. Rep. 177.

the name of the master and owners of the salving vessel, although the master may make no claim on his own behalf.[1] It matters not what are the methods or means pursued to save a vessel or cargo from destruction or loss, the salvors may claim a lien therefor on the property saved or its proceeds. Thus, where a vessel took fire in a harbor, and a tug towed fire engines, commonly used on land, and lay alongside the burning vessel while the engines threw water upon her and extinguished the fire, the owners of the tug were held to be entitled to salvage, although the representatives of the fire department directed the towing to be done, and made no claim for salvage.[2] A corporation may be entitled to salvage as well as a natural person;[3] and the property of the United States may be subject to a lien for salvage.[4] The lien exists upon the property saved, and it requires the most unequivocal acts on the part of the salvors to indicate an abandonment of the lien, so as to defeat the enforcement of the same, and compel them to resort to a suit *in personam* against the owners for payment;[5] but salvors cannot in the same libel proceed *in rem* against the vessel and *in personam* against the consignees of the cargo.[6]

Petitory and Possessory Suits.

§ 48. It is provided by rule that "in all petitory and possessory suits between part owners or adverse proprietors; or by the owners of a ship, or the majority thereof, against the master of a ship for the ascertainment of the title and delivery of the possession, or for the possession only; or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent; or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit."[7]

[1] The Blackwall, 10 Wall. 1.

[2] The Blackwall, 10 Wall. 1. See Millard *v.* The Lighter No. 14, 53 Fed. Rep. 143.

[3] The Camanche, 8 Wall. 448.

[4] The Davis, 10 Wall. 15.

[5] Eads *v.* The H. D. Bacon, 1 Newb. Ad. 274; Howard Towing Assn. *v.* The J. E. Potts, 54 Fed. Rep. 539.

[6] The Sabine, 101 U. S. 384.

[7] Adm. Rule 20.

Where two persons were equal joint owners of a vessel, but one of them was in possession as ship's husband, who left her in an unsafe condition with no person on board, and the other half-owner took possession of her, on an application by the former for her possession, the court refused to interfere.[1] Under the provisions of the rule last cited, where the owner of a one-fourth part of a whale-ship gave notice to the owners of other parts of her that he would not pay anything for the outfits of a whaling voyage contemplated by the latter, but did not in distinct terms dissent from the voyage or apply for security for a return of his share in the ship until she was nearly ready to sail, on a libel filed by him it was held that he was entitled to security by stipulation for the return thereof, and that the return should be to the port of New Bedford, to which she belonged, as it did not appear that the other owners had been misled or subjected to any loss by the delay in making application for security.[2]

The question of title and ownership, as well as the right of possession of vessels, may be determined by a petitory action;[3] but a mere equitable title is not sufficient to justify an interference of a court of admiralty to give possession of a vessel against the legal title, as possession must follow the legal title.[4]

Suits for Mariners' Wages.

§ 49. A contract for mariners' services is a maritime contract, and in suits thereon in admiralty the libellant may proceed against the ship, freight and master, or against the ship and freight; or against the owner alone, or the master alone, *in personam*.[5]

Where a ship is engaged in an unlawful trade, or sails on an illegal voyage, and she is seized and a forfeiture claimed therefor by the government, if the seamen or material-men are innocent of all knowledge thereof or of participation therein, their claims

[1] The Ocean, 1 Sprague 535. A stipulation filed to secure the release of a vessel is not a waiver of the rights of the principal to question the original liability of the vessel: The Fidelity, 16 Blatch. 569.

[2] The Marengo, 1 Sprague 506.

[3] Ward *v.* Peck, 18 How. 267; The Tilton, 5 Mas. 465; Gregg *v.* The Clarissa Ann, 2 Hughes 89; The Friendship, 2 Curt. 426.

[4] The Amelia, 6 Ben. 475; Kynoch *v.* Ives, Newb. 205; The William D. Rice, 3 Ware 134; The Perseverance, 1 Bl. & H. 385.

[5] Adm. Rule 13. A claim for wages may be assigned and the lien passes to the assignee: Mark *v.* The New Idea, 60 Fed. Rep. 294.

for wages or material will be preferred to the claims of forfeiture by the government;[1] but a master has no lien on the ship for his wages by the general maritime law, although he may maintain a suit in admiralty, *in personam*, for wages, or for compensation in the nature of wages.[2]

The lien for seamen's wages attaches not only to the ship, but to the freight, and they have a priority of all other claims; and in case of loss the ship owners are liable therefor.[3] The lien of seamen for wages takes precedence even over bottomry bonds and all other claims or liens, whether the entirety of the fund out of which they should be paid remains or a part of it is lost;[4] and this right extends to the last fragment of the freight, and is "nailed to the last plank of the ship;" and it cannot be affected by any private contract between the owner of the ship and the shippers.[5]

If a portion of a wrecked vessel is saved by the exertions of the seamen and brought into port and sold, they have a lien on the proceeds for their wages.[6] They, like material-men, have a triple security for their wages, namely, the vessel, the owner and the master. The owner is liable, although his name does not appear in the shipping articles; and if a sale of the vessel is made subsequent to the making of the shipping articles, this will not discharge the liability of the owner, even though the voyage was not terminated, and even though the ship be lost; in which latter case they are entitled to wages until discharged.[7] If, however, in case of a wreck they abandon the ship, they lose their lien upon it, and are not restored by the *jus postliminii* on

[1] The St. Jago De Cuba, 9 Wh. 409; The United States *v.* Robertson, 5 Pet. 675; The Langdon Cheves, 2 Mas. 58.

[2] The Steamboat Orleans, 11 Pet. 175; Hammond *v.* The Essex Fire Insurance Co., 4 Mas. 196; Willard *v.* Dorr, 3 Mas. 91.

[3] Brown *et al. v.* Lull, 2 Sum. 443.

[4] A lien for damages caused by negligence has precedence over lien for wages earned before collision; but not over lien for wages earned after collision: Cooper *v.* The F. H. Stanwood, 49 Fed. Rep. 577; S. C. 1 C. C. Ap. 379; Western Transit Co. *v.* The Nettie Woodward, 50 Fed. Rep. 224.

[5] Pitman *v.* Hooper, 3 Sum. 50.

[6] Brackett *et al. v.* The Hercules, Gilp. 184.

[7] Bronde *v.* Haven, Gilpin 592. See also The Brig Blohm, 1 Ben. 228, where under a contract made in Hamburg seamen were allowed, out of a fund produced by a sale of the ship in New York, the voyage not being completed, but they being discharged, two months extra pay.

the salvage of the property by other persons.[1] But they would not lose their claim for a lien by taking an order on the charterer for their wages.[2] They are entitled to the lien from the time the contract is entered into, and while the ship is getting ready to sail, though she may never leave the port.[3]

Suits for Pilots' Wages.

§ 50. The right of a pilot is more limited than that of a seaman, by a rule of admiralty, if not by the general principles of admiralty practice. In the case of a seaman, he may enforce his lien for wages even against the frieght; but in suits for pilotage, the libellant can only proceed against the ship and master, or against the ship or against the owner alone, or the master alone, *in personam*.[4]

Jurisdiction in Case of Torts.

§ 51. In respect to jurisdiction in admiralty depending upon locality in case of tort, by the general principles of the admiralty law the tort must have been committed upon the high seas, or at least within the ebb and flow of the tides.[5] But Congress, by the Judiciary Act of 1789, gave the district courts jurisdiction in admiralty, in certain cases, over fresh waters navigable from the sea with vessels of ten tons burden and upwards;[6] and an act of February 20, 1845, gave them "the same jurisdiction in matters of contract and tort arising in, upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and employed in commerce and navigation upon the lakes and navigable waters connecting them, as is possessed by those courts in cases of the like vessels employed upon the high seas or tide waters, within admiralty or maritime jurisdiction."[7]

[1] Lewis *v.* The Elizabeth and Jane, 1 Ware 41; The Aguan, 48 Fed. Rep. 320. A person hired by a captain of a vessel to act as nominal captain is entitled to the wages agreed upon, and the vessel and owner are liable therefor: L'Arina *v.* Brig Exchange, Bee's Adm. 198; Same *v.* Manwaring, *Ibid.* 199.

[2] The Eastern Star, 1 Ware 185.

[3] The Island City, Low. Dec. 375.

[4] Adm. Rule 14; The Anne, 1 Mas. 507; The Wave, 7 Leg. Obs. 97; Logan *v.* The Eolian, 1 Bond 267.

[5] Waring *v.* Clark, 5 How. 441; The Genesee Chief, 12 How. 443.

[6] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; The Almeida, 10 Wh. 473; The Belfast, 7 Wall. 624; Peyroux *v.* Howard, 7 Pet. 324.

[7] Stat. L., c. 20, v. 5, p. 726.

The provisions of these acts do not appear to be incorporated into the Revised Statutes, by any positive declaration of jurisdiction of the district courts in such cases; but such jurisdiction may well be inferred from a provision of section 566 of said statutes, which is as follows: "In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories, upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it."

In the absence of any positive statutory provision conferring jurisdiction on these courts, or extending their jurisdiction in admiralty over waters not within admiralty jurisdiction as limited by the English law, it has been maintained by very cogent arguments that they may exercise admiralty jurisdiction over the lakes and rivers of the country navigable for the purposes of trade and commerce between states, or between one of the states and a foreign state. The admiralty jurisdiction of the English courts is limited locally to the sea or to waters therewith connected where the tides ebb and flow. The ebb and flow of the tides there is the test of navigability for the purposes of carrying on trade and commerce with foreign states. But it is different in this country. The ebb and flow of the tides here is not the test of navigability of our lakes and rivers to aid commerce between states or with foreign states. Hence it has been held that this limitation and doctrine in the English admiralty law has no proper application in this country, and that the admiralty jurisdiction of the district courts properly extends "wherever vessels float and navigation successfully aids commerce, whether internal or external."[1] In view of these broad and enlightened views of the highest federal tribunal, and taking into consideration the provision of the Revised Statutes above referred to, giving a right of trial by jury in such cases, it may well be inferred that Congress assumed that these courts possessed adequate powers

[1] The Hine, 4 Wall. 555; The Genesee Chief, 12 How. 443; The Moses Taylor, 4 Wall. 411; The Eagle, 8 *id.* 15; The Steamboat Co., 16 *id.* 522. See cases cited in note to § 41 *ante*.

in such cases, without a direct legislative declaration to that effect. The question in such a case as to the navigability of rivers and lakes for the purposes aforesaid would be one of fact, and the jurisdiction would be limited to vessels engaged in foreign commerce, or commerce between states, and would not ordinarily extend to the internal commerce of a state, or to the enforcement of state laws relating to internal commerce.[1]

Suits for Collisions.

§ 52. By a rule of court, in a suit for damage caused by a collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or owner *in personam*.[2]

If a libel is filed for damage caused by a collision in a foreign port, the rights of the parties would be governed by the law of the country where the collision occurred; and if doubts exist as to the true construction of the law, resort may be had to the construction made by the courts in the foreign country. This doctrine is consonant with the general principles of the law, and was followed in this country in a case of libel for damages occurring in an English port.[3]

Libel against the Vessel and Master.

§ 53. By the provisions of the rule last cited, the proceeding in admiralty for a collision may be *in rem* against the vessel, and *in personam* against the master, and these remedies may be joined in one proceeding;[4] or it may be against the ship alone; or it may be against the master or owner alone *in personam*. But the rule does not authorize a proceeding against the ship *in rem* and personally against the owner at the same time.[5]

[1] Maguire *v.* Card, 21 How. 248. An exception to this doctrine may however arise in cases of claims for salvage: Allen *v.* Newberry, 21 How. 244.

[2] Adm. Rule 15. See also Adm. Rule 59 for the practice in cases where there are allegations showing fault or negligence in any other vessel contributing to the same collision. In a collision case a circuit court of appeals will modify the decree of the lower court as to interest, where it differs from the conclusions of the lower court as to the degree of fault in the respective vessels: The North Star, 22 U. S. App. 242.

[3] Smith *v.* Condry, 1 How. 28.

[4] Newell *v.* Norton and Ship, 3 Wall. 257.

[5] The Atlantic and Ogdensburg, 1 Newb. Adm. 139; Ward *v.* The Ogdensburg, 5 McLean 622; The Corsair, 145 U. S. 335.

Where the loss from collision arises from the negligence of the master and crew, the master is liable as well as the ship.[1] Under the present rule the remedy might be against both jointly, and they would not be exempted from liability if, even after a wreck caused by a collision, a portion of the cargo is injured or lost through efforts of another vessel to save it.[2]

In the absence of an act of Congress or a state statute giving a right of action therefor, a suit in admiralty cannot be maintained to recover damages for the death of a human being, caused by negligence.[3] The district court has no power to entertain a libel *in rem* for damages incurred by loss of life where by the local law a right of action survives to the administrator or relatives of the deceased, but no lien is expressly created by the act.[4] The statutory right may be enforced by an action *in personam* in admiralty.[5]

Assault and Battery.

§ 54. In suits for assault and battery committed upon the high seas, or elsewhere within the admiralty and maritime jurisdiction of the district courts, the proceeding can be only *in personam*.[6] There is a different rule, usually applicable to the deportment of persons to each other on land, from that which obtains on board a ship. The authority of officers must be respected on the latter, and they are authorized to punish for disobedience. But a seaman may recover damages for an assault and battery inflicted wantonly and without cause by an officer;[7] or where, although a punishment is inflicted for a provocation and just cause, it is done in a cruel or excessive manner, or where it is inflicted with a dangerous or deadly weapon.[8] So the master is liable for an unjustifiable assault and battery by one of his officers upon one of the crew, where it is done by his direction or command, connivance or consent; and these will

[1] Hale *v.* Wash. Ins. Co., 2 Story 176.

[2] The Narragansett, Olc. 246.

[3] The Harrisburg, 119 U. S. 199.

[4] The Corsair, 145 U. S. 335.

[5] The City of Norwalk, 55 Fed. Rep. 98; The Car Float No. 16, 61 *id.* 364; s. c. 9 C. C. Ap. 521; Nelson *v.* The Premier, 59 Fed. Rep. 797.

[6] Adm. Rule 16; Thomas *v.* Lane, 2 Sum. 1. The jurisdiction of the court depending upon locality should appear from the libel: *Ibid.*

[7] The owners are not liable for such an act of the officer: Gabrielson *v.* Waydell, 135 N. Y. 1.

[8] Forbes *v.* Parsons, Crabbe 288.

be presumed where he had knowledge of it and did not interfere to prevent it.[1]

The authority of the master or captain of a vessel to punish seamen for disobedience ends, it seems, with the voyage; and if an offending seaman is afterwards taken again on board, the officer cannot thereafter punish or assault and beat him for an offence committed before he discharged him.[2]

Injury to Passengers.

§ 55. The admiralty jurisdiction of the district courts extends to assault and battery of passengers as well as to seamen, and they may recover damages for willful and wanton injuries, whether they are the result of direct force or merely consequential and indirect, as where a passenger has been subjected to gross ignominy and mental suffering by the brutal maltreatment and insults of the master of the vessel. It extends to every species of torts and wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law would be an action on the case.[3]

Suits on Debentures.

§ 56. Whenever an importer of merchandise enters it for exportation and pays the duties thereon, he is usually entitled to a certain amount of the sum thus paid on the exportation thereof, called a drawback.[4] And if the importer makes a request therefor in writing, it is the duty of the collector of the port of entry to issue a certificate of drawback in writing showing that the importer is entitled to a certain sum from the government on the exportation of the identical goods on which the import duties have been paid, which certificates are called debentures. These debentures are assignable by delivery and indorsement, and in case of the refusal of the collector of the district where it was granted, for a longer period than three years after the same becomes due and payable, to pay the same, as provided by the ninth chapter of the Revised Statutes, the assignee may bring

[1] Hanson *v.* Fowle, 1 Saw. (C. C.) 539.

[2] Roberts *v.* Dallas, Bee's Adm. 239.

[3] Chamberlain *v.* Chandler, 3 Mas. 242; Phila., W. & B. R. Co. *v.* Towboat Co., 23 How. 209; The Plymouth, 3 Wall. 20; The New World *v.* King, 16 How. 469; The Eagle, 8 Wall. 15.

[4] See Rev. Stat. ch. ix.

suit thereon against the person to whom it was originally granted, or against any indorser thereof, either in the district or circuit courts of the United States.[1]

Suits for Damages against Conspirators; Equal Rights of all Persons.[2]

§ 57. Chapter xxiv. of the Revised Statutes provides for the recovery of damages sustained by any person on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in said chapter; and the district courts have jurisdiction of all such suits.[3] So these courts have jurisdiction of suits at law or in equity to redress the deprivation, under the color of law, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States, or by any law of the United States, to persons within the jurisdiction thereof.[4]

Suits to Recover Offices, Remove Officers and against National Banks.

§ 58. The district court has also jurisdiction of suits to recover the possession of any office except that of elector of President or Vice-President, or delegate in Congress, or member of a state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of a denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude. But such jurisdiction only extends so far as to determine the rights of the parties to such office by reason of the denial of the right, guaranteed by the Constitution and secured by any law, to enforce the right of citizens of the United States to vote in all the states.[5] So it has jurisdiction of proceedings by *quo warranto* prosecuted by any district attorney for the removal from

[1] Rev. Stat. § 563, sub. 10, § 629, sub. 8, § 3039, § 3040. Suit may be maintained in the Court of Claims for drawbacks under the Act of August 5, 1861, c. 45 § 4: Campbell *v.* U. S., 107 U. S. 407.

[2] Statutes and authorities cited and examined in note to Younger *v.* Judah, by Wm. L. Murfree, 35 Cent. Law J. 269.

[3] Rev. Stat. § 563, sub. 11. See U. S. *v.* Sauges, 48 Fed. Rep. 78.

[4] Rev. Stat. sub. 12; *Ibid.* §§ 1977, 1979.

[5] Rev. Stat. § 563, sub. 13; see also § 2610.

office of any person holding the same, except as a member of Congress or of a state legislature, contrary to the provisions of the third section of the fourteenth article of the amendment to the Constitution of the United States.[1] So it has jurisdiction of all suits by or against any association established under any law providing for national banking associations within the district for which the court is held,[2] and of all suits brought by any alien for a tort only, in violation of the law of nations, or of a treaty of the United States.[3]

Suits against Consuls and Vice-Consuls.

§ 59. The district court has also jurisdiction of suits against consuls and vice-consuls, except for offences above that of a tort in violation of the law of nations, or of a treaty of the United States.[4] International law does not exempt consuls from the jurisdiction of the circuit courts, and they may sue and be sued in them within the district of their residence, if the value of the amount in dispute exceeds five hundred dollars.[5] The jurisdiction of the district court in such cases is exclusive of state courts; and it has been held that if a consul is sued in a state court and he neglects to plead his exemption from its jurisdiction, it is not a waiver of his privilege, as it is the privilege of the country which he represents and not merely a personal privilege, and the fact may be shown at any time.[6]

In Bankruptcy.

§ 60. The district courts are courts of bankruptcy, and have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy.[7] As we have at present no national bankrupt law (the Bankrupt Act of 1867 having been repealed in 1879), it is hardly necessary to give this subject that consideration which its importance would demand if there were a bankrupt law in force.

[1] Rev. Stat. § 563, sub. 14.
[2] Rev. Stat. § 563, sub. 15.
[3] Rev. Stat. § 563, sub. 16.
[4] Rev. Stat. § 563, sub. 17.
[5] Lorway *v.* Lousada, 1 Am. Law Rev. 92; 1 Low. (C. C.) 77; Gettings *v.* Crawford, Taney (C. C.) 1; Rev. Stat. § 629, par. 1, Act of March 3, 1875, § 1.
[6] Davis *v.* Packard, 6 Pet. 414, s. c. 7 Pet. 276. See also St. Luke's Hospital *v.* Barkley, 3 Blatch. (C. C.) 259.
[7] 2 Rev. Stat. § 563, sub. 18.

CHAPTER VI.

PLEADING AND PRACTICE IN ADMIRALTY.

General Principles.

§ 61. The general rules, principles and modes of procedure which obtained in the English courts of admiralty and maritime jurisdiction at the inception of our government are substantially applicable to our federal courts of admiralty and maritime jurisdiction. These have in some cases been changed or modified by acts of Congress, and regulated by rules prescribed by the Supreme Court, and by local rules of the courts in the various districts.[1] But the exercise of powers and usages by the district courts, generally recognized as belonging to courts of admiralty and maritime jurisdiction, cannot be restrained by mere rules of court.[2]

The Libel.

§ 62. The first pleading on the part of the libellant or party instituting proceedings on the admiralty side of the court is the libel, which should contain a clear statement of the material facts of the case in distinct articles or paragraphs, consecutively numbered, of the wrongs done for which he claims damages, and the grounds on which he bases his claims to property, with such sufficient fullness and precision as to enable the defendant to answer distinctly each material averment; and it should especially contain averments which bring the case within the admiralty jurisdiction of the court.[3] The pleadings in admiralty are simple

[1] Manro *v.* Almeida, 10 Wh. 473; United States *v.* The Little Charles, 1 Brock. 380; Jennings *v.* Carson, 4 Cr. 2; Adm. Rule 46; Beers *v.* Haughton, 9 Pet. 329.

[2] Gates *v.* Johnson, 11 L. Rep. N. S. 279.

[3] The Boston, 1 Sum. 328; Talbot *v.* Wakeman, 19 How. Pr. 36; Dupont *v.* Vance, 19 How. 162; The Adaline, 9 Cr. 244; Thomas *v.* Lane, 2 Sum. 1; Orne *v* Townsend, 4 Mas. 541; Treadwell *v.* Joseph, 1 Sum. 390; The Washington, 4 Blatch. 101;

and untechnical, and in this respect they correspond more closely with pleadings in equity than with those of the common law.

Process cannot Issue until the Libel is Filed.

§ 63. No mesne process can issue in any civil cause of admiralty or maritime jurisdiction until the libel or libel of information is filed in the office of the clerk of the court from which relief is sought. And all process must be served by the marshal or his deputy, or, where they are interested, by some discreet and disinterested person appointed by the court.[1] The process must be directed to the marshal or his deputy, or, where he or they are interested, to some discreet and disinterested person appointed by the court; and it cannot be served by a private person, although by the laws of the state original process may be so served.[2]

The Mesne Process.

§ 64. In suits *in personam*, the mesne process may be by a simple warrant of arrest of the person of the defendant in the nature of a *capias*, or warrant of arrest of the person of the defendant, with a clause therein that, if he cannot be found, his goods and chattels be attached to the amount sued for; and if such property cannot be found, his credits and effects be attached to the amount sued for in the hands of garnishees named therein, or by a simple monition in the nature of a summons to appear and answer to the suit, as the libellant shall in his libel or information pray for or elect.[3]

Several Claims for Damages.

§ 65. If several claims for damages are united in one libel, it would seem advisable to state the facts of each separately in a distinct article or paragraph, as otherwise the defendant might not be able to make a proper answer and it would be subject to exception.[4] If the libel is for damages for an assault and battery,

The Oscoda, 66 Fed. Rep. 347. A libel *in personam* against the owners for damages caused by collision must aver that respondent was the owner of the vessel when the collision occurred: The Corsair, 145 U. S. 335.

[1] Adm. Rule 1.

[2] Schwabacker *v.* Reilly, 2 Dill. 127; The United States *v.* The Little Charles, 1 Brock. 380.

[3] Adm. Rule 2.

[4] Treadwell *v.* Joseph, 1 Sum. 390. A number of claims may be joined: The Queen of the Pacific, 61 Fed. Rep. 213. Proceedings on separate libels may be consolidated and tried together: The Eliza Lines, *Ibid.* 308.

it is sufficient to set forth the facts constituting the offence; but if it is designed to recover for several distinct and separate torts of this kind, it is desirable, if not necessary, to set them out distinctly in separate and distinct *articles*, in order that proper evidence may be offered in support of them, as it is a general rule in admiralty as well as at law and in equity, that the proofs must be confined to and follow the allegations of the pleadings.[1] Under a rule, however, prescribed by the Supreme Court, amendments in pleadings in admiralty may be made in matters of form, on a mere motion to the court, as of course, in matters of substance, upon motion at any time before a decree, upon such terms as the court shall impose. But evidence variant from the pleadings will not furnish grounds for excluding it, unless it is calculated to mislead.[2]

Suits against the Ship's Tackle, etc.

§ 66. In case of proceedings against a ship, her tackle, sails apparel, furniture, boats or other appurtenances, if such tackle, sails, apparel, furniture, boats or other appurtenances are in the possession of any third person, the court may, after the filing of the libel, issue a monition to such person to show cause, if any, why the same should not be delivered to the marshal, and the court may upon the hearing, if any, award and decree that the same be delivered into the custody of the marshal if it appears to be required by law and justice.[3]

Order for Process to Issue; Stipulation for Costs.

§ 67. There does not appear to be any positive statutory provision or rule prescribed by the Supreme Court requiring the libellant to give security for costs; but this is perhaps generally required by rules adopted by the various district courts. Nor is there any statute or rule requiring the issuance of process, but the practice is to obtain an order of the judge for the proper process to issue; and this is especially required where the suit

[1] McKinlay *v.* Morrish, 21 How. 343; Kramme *v.* The New England, Newb. 481; Campbell *v.* The Uncle Sam, 1 McAll. 77.

[2] Adm. Rule 24; Crawford *v.* The William Penn, 3 Wash. 484; The Clement, 2 Curt. 363.

[3] Adm. Rule 8. See also as to attachments or replevin of property, Certain Logs of Mahogany, 2 Sum. 589.

is *in personam*, and a warrant of arrest either of the person or property is asked, for a sum exceeding five hundred dollars.[1]

It is further provided by rule that bonds and stipulations in admiralty suits may be given and taken in open court or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail or depositions in cases pending before the court or any commissioner of the United States authorized to take bail and affidavits in civil cases.[2]

The stipulation should be signed by the libellant and the sureties, and be acknowledged before the proper officer, who should require a justification by affidavit on the part of the surety. If, however, there is a defective stipulation filed with the clerk, the defect will be deemed waived unless excepted to by the party interested therein before the close of the term of court next subsequent to its becoming known to him.[3]

New Sureties, when Required; Bail Reduced.

§ 68. It is further provided by rule that in all suits *in personam*, where bail is taken, the court may on motion therefor reduce the amount of the bail; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as provided by the rules, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given upon due proof thereof.[4]

In Case of Contracts or Torts, may Attach.

§ 69. The district courts have, as we have observed, jurisdiction of maritime contracts and torts, and of suits *in personam* as well as *in rem*. If the suit is *in personam*, the court may issue a process of arrest which may contain an attachment clause, and if the defendant has absconded or cannot be found within the jurisdiction of the court, the property of the defendant may be attached; and in case of default, the attached property may be condemned to answer the claim of the libellant. If property of the defendant cannot be found, the credits and effects of the defendant in the hands of the third parties may be garnisheed.[5] The primary object in all such cases is to secure

[1] Adm. Rule 7.

[2] Adm. Rule 5.

[3] Abb. Adm. 327; Sawyer *v.* Oakham, 11 Blatch. C. C. 65.

[4] Adm. Rule 6.

[5] Adm. Rule 2; Manro *v.* The Almeida, 10 Wh. 473; McGrath *v.* The Candalero, Bee's Adm. 64; Bouysson

the appearance of the defendant in the suit, and not the arrest of the property.

When Attachments may be Dissolved.

§ 70. When property is attached in a suit *in personam*, under a warrant authorizing the same, the attachment may be dissolved by order of the court to which the warrant is returnable, by the giving of a bond or stipulation by the defendant, with sufficient sureties, to abide by all orders of the court, interlocutory or final, and to pay the amount awarded by the final decree rendered by said court or any appellate court; and execution may issue against said principal and sureties from either of said courts, to enforce a final decree rendered therein.[1] The bond in such a case becomes a substitute for the property seized, and the question as to the right to subject the property to the claim of the libellant must be determined before a final decree can be rendered on the bond, either by the district court or the circuit court of appeals on appeal, and the Supreme Court cannot review this question. And if such a bond or stipulation is given by a member of a firm, at their request and for their benefit, this bars a suit against the other partners.[2]

When the Marshal may take Bail; Summary Process.

§ 71. It is further provided by rule, that "in all suits *in personam* where a simple warrant of arrest issues and is executed, the marshal may take bail with sufficient sureties from the parties arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable to enforce the final decree so rendered, or upon appeal by the appellate court."[3]

v. Miller, *id.* 186; Reed *v.* Hussey, 1 Blatch. & H. 525; Mankin *v.* Chandler, 2 Brock. 125.

[1] Adm. Rule 4. The property will not be released where it is of less value than the debt sued for and the bond is conditioned for payment of value of property released: Pope *v.* Seckworth, 46 Fed. Rep. 858.

[2] United States *v.* Ames, 99 U. S. 35.

[3] Adm. Rule 3.

It is not sufficient under this rule, in order to release the party in custody, that he give a stipulation for costs on the return day of the process, but he is required to give a bond or stipulation to satisfy any decree which may be rendered against him in the suit, and until this is done he cannot be discharged from arrest.[1] Where the condition of the bond provided that the parties would perform the decree of the court, etc., it was held that this meant the court that should ultimately decide the case.[2] But the court will not suffer a party to be held to bail in two places at the same time, for the same cause of action.[3]

When a decree is rendered against the principal in the bond or stipulation, execution may properly issue against the stipulators, upon the decree rendered, as well as against the principal.[4]

When a Warrant of Arrest Cannot Issue.

§ 72. It has already been incidentally observed that no warrant of arrest, either of the person or property of the defendant, in suits *in personam*, can issue for a sum exceeding five hundred dollars, unless by special order of the court, upon affidavit or other proper proof, showing the propriety thereof.[5]

The Claim; Pleading of a Claimant in Proceedings in rem.

§ 73. A person who claims the property involved in a proceeding *in rem* may, by a sort of pleading called a claim, intervene in the suit and have his right to the same adjudicated in the same suit. He may obtain the property, in the first instance by depositing in court so much money as the court shall order, or by giving a stipulation with sureties, after an appraisement of the property, in such sum and on such conditions as the court may direct. The court on the hearing may adjudge the property to him, or that he receive the balance of its proceeds after satisfying any decree in favor of the libellant, as the case may require.[6]

[1] Gardner *v.* Isaacson, Abb. Adm. 141.

[2] The U. S. *v.* Little Charles, 1 Brock. C. C. 380.

[3] Bingham *v.* Wilkins, Crabbe 50.

[4] Gaines *v.* Travers, Abb. Adm. 422.

[5] Adm. Rule 7; Marshal *v.* Bazin, 7 N. Y. Leg. Obs. 342.

[6] Conk. Adm. 203, and notes; Adm. Rule 10, 11. But a stipulation filed to release a vessel is not a waiver of the question of original liability: The Fidelity, 16 Blatch. 569.

Where the Property Arrested is owned by Several or Jointly.

§ 74. It frequently occurs that property arrested by proceedings in admiralty is owned by several parties, as, for instance, a vessel or its cargo, in which latter case there might, and usually would, be several owners of it. In such a case it seems to be the practice to allow one of them to make a claim on behalf of himself and the other owner or owners; but, where the property interests are distinct, it is required by the general principles of admiralty practice that the claims be set up by each of the several owners. Between such parties there is no priority of interest, and their interests are, therefore, independent matters of adjudication. Several parties owning distinct parts of a cargo, separately may interpose in case of a libel for salvage, although the libel is against the whole, and the claims of the several parties would be adjusted in the one proceeding, as if it had been a distinct proceeding against the particular property of each owner. And in case any particular part of the property arrested is not claimed, it is the practice of the court to retain possession of it for at least a year and a day from the time the proceedings are instituted, unless some claimant sooner appears.

As a general rule the claimant is required to intervene on the return day of the process, and then be ready to file his claim in court; and in case of failure so to do, or of the defendant to appear and answer by that time, the libel may be taken *pro confesso;* but it is usual to allow a reasonable time thereafter to the defendant to prepare an answer, where he applies for further time.[1]

Sometimes the claim of proprietory right is joined with an answer, and called a claim and answer; but as the right of a claimant in court rests upon his right of property or that of his principal, and this alone gives him a right to interpose a claim, it has been considered the better practice to put in the claim separately.[2]

The Claim Must be Verified; Stipulation for Costs.

§ 75. It is required by a rule of practice in admiralty prescribed by the Supreme Court that, "in suits *in rem*, the party

[1] Conk. U. S. Adm. 303 *et seq.*; Adm. Rule 29. [2] *Ibid.*

claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and *bona fide* owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner." The claimant in such a case is required to file a stipulation with sureties in such sum as the court may direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon an appeal by the appellate court.[1]

When the Ship will be Delivered to a Claimant.

§ 76. If any ship shall be arrested, it may, upon the application of a claimant, be delivered to him upon an appraisement had under the direction of the court, and upon his depositing in the court so much money as the court shall order; or upon his giving a stipulation, with sureties in such sum as the court shall direct, to abide by and pay the money that may be awarded by the final decree rendered by the court, or the appellate court if an appeal intervenes, as the one or the other course shall be ordered by the court; and if the claimant shall fail to make such application, then the court may, on the application of either party, upon due cause shown, order a sale of the ship which has been arrested, and the proceeds thereof to be brought into court, or otherwise disposed of as it may deem most beneficial for all concerned.[2]

Stipulation by One of the Owners of a Vessel.

§ 77. The appraisement provided for by the rules of court on an application for the delivery of a ship to a claimant as aforesaid is conclusive upon the party to whom it is delivered upon such an application. He cannot afterwards insist that the ship was of less value than that at which it was appraised; nor can he be held beyond this appraised value, or show that he had discharged other liens, diminishing the amount for which he was personally liable in the first instance.[3]

[1] Adm. Rule 26.

[2] Adm. Rule 11.

[3] The Virgin, 8 Pet. 538. But the giving of a stipulation waives no

Perishable Goods Sold.

§ 78. If the goods or other things arrested are perishable or liable to deterioration, decay or injury by detention in the custody of the marshal pending the suit, the court will, upon the application of either party, in its discretion, order the same or so much thereof as shall be perishable or liable to depreciation, decay or injury by detention, to be sold, and the proceeds, or so much thereof as shall be sufficient to satisfy any decree which may be rendered in the case, to be brought into court to abide the event of the suit; or the court may, upon the application of a claimant, order a delivery thereof to him, upon due appraisement to be had under its direction, either upon the claimant depositing in court so much money as the court shall order, or upon his giving a stipulation with sureties, in such sum as the court shall direct, to abide by and pay the money awarded by the final decree which may be rendered by the court, or the appellate court if an appeal is taken, as the one or the other course is ordered by the court.[1]

It is not a matter of absolute right in such cases for either party to have a delivery of property on bail; but if a ship is liable to be injured by a delay during a suit for salvage or the cargo to deteriorate, it is proper to apply to the court for a sale thereof; and if, on a proper showing of facts, it would appear to be for the interest of all parties concerned, the court should order the sale.[2] In case of appeal the *thing* does not follow the appeal to the higher court, but remains in the court below, which may thereafter order a sale of the property on a proper application and showing as aforesaid.[3]

Where a State Court has Acquired Jurisdiction.

§ 79. The district courts will not interfere in a proceeding *in rem* with property properly in the custody of a state court. The tribunal having jurisdiction, and first exercising it in such a case, may proceed without the interference of the other. Thus, if a party attaches a vessel by a process issued from a state court, and under the statutes of a state providing for such a proceeding,

rights of the stipulator in reference to original liability: 16 Blatch. 569.

[1] Adm. Rule 10.

[2] The Nathaniel Hooper, 3 Sum. 543. See also the Cheshire, Blatch. Pr. Cas. 165; The Elly Warley, *Ibid.* 213.

[3] Jennings *v.* Carson, 4 Cr. 1.

to secure a claim for material furnished, and a libel is subsequently filed by another person in a district court to enforce a lien for material furnished to repair the same vessel, the attachment issued from the state court would have priority over that of the federal court, and the plaintiff in the former suit could not be prejudiced by the latter.[1]

Information and Libel on Seizures.

§ 80. It is required that "all informations and libels of information upon seizures for any breach of the revenue or navigation, or other laws of the United States, shall state the place of seizure, whether it be on the land or the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is."[2] It is further required that the information or libel of information "propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such cases provided as the case may require;" and it must "conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed."[3]

It is necessary that the information or libel of information should aver specially all the facts constituting the offence charged; and a general reference to the provisions of the statutes claimed to have been violated is not sufficient.[4] But liberal provisions are made for amendments,[5] and an informal libel or information may be amended by leave of the court. And where a suit was

[1] The Fulton, 1 Paine 520. See also Hine *v.* Trevor, 4 Wall. 55; s. c., 17 *id.* 349; Leon *v.* Galcerean, 11 *id.* 185; Donnell *v.* The Starlight, 103 Mass. 227.

[2] Adm. Rule 22.

[3] *Ibid.*

[4] The Caroline *v.* United States, 7 Cr. 496; The Happet and Cargo *v.* United States, *Ibid.* 389; The Margaret, 9 Wh. 421. There must be certainty, in case several illegal acts are charged, as to which constitutes the offence: The Caroline, 1 Brock. 384; The Gazette, 128 U. S. 474. Technical rules of common law pleading do not exist in admiralty: Dupont *v.* Vance, 19 How. 162; as to essentials of the libel, and the right to amend, see 2 Parsons, Sh. and Adm. 370–1; 379–87; 429–32.

[5] Adm. Rule 24.

brought against a vessel and master jointly, to recover a penalty for importing goods which were not included in the manifest, it was held proper to dismiss the suit as to the master, as he would be entitled under the statute to a jury trial, and proceed against the vessel *in rem.*[1]

It is manifest from the provisions of this rule that the owner of the libelled property may be represented by another in the presentation of the claim. Thus, while the ship against which the proceedings are instituted is at the time of the arrest in the possession of the master of the ship, he may put in the claim as bailee for the owner, and verify it.[2]

Such claim and verification is by no means conclusive of the right of property, but only enables the claimant to controvert the claims of the libellant and allows him by proofs to establish his right thereto. If it should, however, appear on the trial that his claim was not well founded, whether the claims of the libellant were established or not, and that some other party not represented by the claimant was the owner, or had an adverse interest in it, the court would retain the property, and allow him an opportunity to claim it.[3]

How Decrees may be Enforced.

§ 81. The final decree of the district court in admiralty for the payment of money may be enforced by a writ of execution, to which the libellant is entitled, in the nature of a *fieri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other estate of the defendant or his stipulators.[4]

The execution issues summarily against stipulators, upon a decree being rendered against the principals, the execution of the stipulation by them being regarded as an agreement to submit to such decrees as may be entered against those for whom they have become thereby bound.[5]

Prize Causes.

§ 82. The district courts have exclusive cognizance of all prize causes, except as provided by paragraph six of section 629

[1] The United States *v.* The Steamship Queen, 11 Blatch. 416.

[2] Adm. Rule 26, see *post.*

[3] Conk. Adm.

[4] Adm. Rule 21.

[5] Gaines *v.* Travis, 1 Abb. Adm. 422; The Blanche Page, 16 Blatch. 1.

of the Revised Statutes,[1] which also confers concurrent jurisdiction upon the circuit courts, in proceedings to condemn property taken as prize which is used or intended to be used to aid any insurrection.[2]

In the adjudication of these cases they may decree a restitution of the whole or a part of the captured property, and they may decree damages against the captors, where the capture was wrongful and without probable cause;[3] and if the seizure was not only illegal, but a gross and wanton outrage, the court is not limited, in its decree of damages against the captors, to the actual pecuniary loss sustained by the seizure, but may, in analogy to the doctrine of the common law relating to damages for willful outrage and oppression, give such damages to the injured party as will compensate for the mental suffering and humiliation which may have been sustained thereby, or damages of a punitive or exemplary character.[4]

By the general principles of the admiralty law, seizures must be made upon the high seas, or on contiguous waters where the tide ebbs and flows;[5] but the section under consideration confers exclusive jurisdiction on the district courts in all cases where the seizure is made on land, or on waters not within admiralty jurisdiction, except in cases of proceedings for the condemnation of property captured under a claim that it was used or intended to be used in aid of an insurrection against the government of the United States, in which latter case the circuit courts have also jurisdiction.[6]

In Cases of Seizure: Process.

§ 83. In all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, must be by warrant of arrest of the ship, goods or other things

[1] Rev. Stat. § 629, pars. 6 and 9.

[2] Rev. Stat. § 629, sub. 6; *Ibid* § 5308.

[3] Glass *v.* Sloop Betsey, 3 Dall. 6 (1793); Penhallow *v.* Doan, 3 Dall. 54; Talbot *v.* Janson, 3 Dall. 133; Bingham *v.* Cabot, 3 Dall. 19; Jennings *v.* Carson, 4 Cr. 2; Bowen *v.* United States, 8 Cr. 110; The Estella, 4 Wh. 298; The Siren, 7 Wall. 152.

[4] The Amiable Nancy, 3 Wh. 546; The Siren, 7 Wall. 152; The Brig Alerta *v.* Moran, 9 Cr. 359; The Estella, 4 Wh. 307; Keene *v.* The United States, 5 Cr. 304; United States *v.* Schooner Sally, 2 *id.* 406.

[5] The Sarah, 8 Wh. 391.

[6] Rev. Stat. § 563, sub. 8; *Ibid* § 629, sub. 6; *Ibid.* 5308.

to be arrested; and the marshal is thereupon required to arrest and take the ship, goods or other thing into his possession for safe custody; and it is his duty to give public notice thereof, and of the time assigned for the return of such process and the hearing of the cause, in such newspaper within the district as the court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.[1]

Condemnation of Property Employed in Aid of Insurrection.

§ 84. The statutes provide for the seizure and condemnation as prize of any property used or intended to be used in aid of any insurrection against the government of the United States;[2] and, as we have seen, both the circuit and district courts have cognizance of such causes.[3] This provision of the Revised Statutes is a substantial re-enactment of the provisions of the Act of Congress of August 6, 1861, under which it was determined that it covered all descriptions of property both real and personal, whether on land or water; that the proceedings under the act for condemnation of real estate or other property on land should be shaped in conformity with the general practice in admiralty cases; and that the issues of fact in such cases should, on the request of either party, be submitted to a jury.[4]

Authority of the Court over Funds derived from Confiscated Property.

§ 85. The proceeds of confiscated property paid into court are under its control until they are distributed pursuant to a final decree in the cause; and if they are withdrawn without authority

[1] Adm. Rule 9.

[2] Rev. Stat. § 5308.

[3] Rev. Stat. § 563, par. 9, and § 629, par 6.

[4] Union Ins. Co. *v.* United States, 6 Wall. 759. See also The Vengeance, 3 Dall. 297; The Sarah, 8 Wh. 394.

For other matters touching proceedings under confiscation, practice and pleadings, and effect of confiscation, etc., see The Confiscation cases, 20 Wall. 92, 114, 115: United States *v.* Winchester, 99 U. S. 372; Wallack *v.* Van Riswick, 92 *id.* 202; Pike *v.* Wassell, 94 *id.* 711; Avegno *v.* Schmidt, 113 *id.* 293; Shields *v.* Schiff, 124 *id.* 351; Sabariego *v.* Maverick, *Ibid.* 261; Ill. Cent. R. R. Co. *v.* Bosworth, 133 *id.* 92; Jenkins *v.* Collard, 145 *id.* 546; Briggs *v.* U. S., 143 *id.* 346; U. S. *v.* Dunnington, 146 *id.* 338; Duvall *v.* U. S., 154 *id.* 548; U. S. *v.* Hallock, *Ibid.* 537.

of the court, it can by summary proceedings compel their restitution.[1]

Distinction between Instance and Prize Causes.

§ 86. The distinction between the instance and prize side of the court, in the exercise of admiralty jurisdiction, is clear and important to be observed. In the former case the power of the court rests upon the statutes, in the latter upon the general principles of the common law, relating to admiralty practice and procedure. Hence, if the records show that the case is on the instance side of the court for a forfeiture under a statute, the property sought to be condemned cannot be condemned as prize; and if it shows a proceeding for the condemnation of property as prize, it cannot be condemned under the statutes for a forfeiture on the instance side of the court.[2]

Seizures Cognizable in the District Court of the District into which the Property may be Taken.

§ 87. In case of the seizure for forfeiture of any vessel or cargo entering any port or harbor which has been closed by the President of the United States in pursuance of law, or of goods or chattels coming from a state or section of the country declared by the President to be in insurrection, into other parts of the United States, or of any vessel or vehicles conveying such property, or conveying persons to or from such state or section, or of any vessel belonging in whole or in part to any inhabitant of such state or section, the proceeding may be prosecuted in any district court into which the property so seized may be taken and proceedings instituted; and the district courts have in such cases as full and complete jurisdiction over such proceedings as if the seizure had been made in that district.[3] By the general practice in such cases, where there is a seizure upon the high seas, any

[1] Osborne *v.* United States, 91 U. S. 474. See also Morris' Cotton, 8 Wall. 507; Mrs. Alexander's Cotton, 2 Wall. 404; Union Ins. Co. *v.* United States, 6 Wall. 759; Armstrong's Foundry, *Ibid.* 766; United States *v.* Shares of Capital Stock, 5 Blatch. 231.

[2] United States *v.* Weed, 5 Wall. 62; Jecker *v.* Montgomery, 13 How. 498; The Brig Caroline, 7 Cr. 496; The Samuel, 1 Wh. 9; The Mary Anne, 8 *id.* 380; The Venice, 2 Wall. 258; Cappell *v.* Hall, *Ibid.* 542; Mrs. Alexander's Cotton, *Ibid.* 404. The question is more fully discussed in 2 Parsons' Sh. and Adm. 429, 431, title "Amendments."

[3] Rev. Stat. § 564.

district court may take cognizance of proceedings for the forfeiture, in any district into which the property is brought.[1]

Trial by Jury, when.

§ 88. Section 566 of the Revised Statutes provides that "the trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, . . . shall be by jury." And in certain admiralty cases which relate "to any matter of contract or tort, upon or concerning any vessel of twenty tons burden or upward enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it."

Although the statute provides for a trial of issues of fact in certain cases by a jury, still this right may be waived, and the parties may stipulate for a trial of these issues by the court, even upon an agreed statement of facts, and the parties have this right independent of any legislative provision.[2]

Libels in Instance Causes.

§ 89. What is required to be stated in libels in instance causes is provided by rule as follows: "All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause civil and maritime of contract, or of tort or damage, or of salvage, or of possession, or otherwise as the case may be; and if the libel be *in rem*, that the property is within the district; and, if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, *in rem* or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the pre-

[1] The Abby, 1 Mason 360. See also The Maggie Hammond, 9 Wall. 435; The Merino, 9 Wh. 391.

[2] Henderson's Distilled Spirits, 14 Wall. 44.

mises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof."[1] It is not necessary to state any facts which constitute a defence of the claimant of the vessel, or a ground of exception to the operation of the law on which the libel is founded;[2] but the libel should show facts conferring jurisdiction on the court; and no evidence is admissible except to sustain its allegations.[3] And it should state in distinct allegations the matters relied upon as grounds of forfeiture.[4]

Amendments.

§ 90. Liberal provisions, as we have noticed, are made by rule for amendments of pleadings in causes of admiralty and maritime jurisdiction; and in matters of form, they may be made at any time on motion to the court, as of course.[5] But if it is desired to add new counts to the information or libel, or amend upon matters of substance, this may be done upon motion, at any time before a final decree, only on such terms as the court may impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.[6]

Under this rule, where a libellant proceeded originally against a vessel, master, owners and pilot, he could by leave of court amend his libel so as to apply to the vessel and master only.[7]

Defendant to Give Security.

§ 91. Upon the appearance of the defendant in a suit *in personam*, where no bail has been taken of him, and no attachment of property has been made to answer the exigency of the suit, the court, in its discretion, may require the defendant to give a

[1] Adm. Rule 23; About 18,000 Gallons of Distilled Spirits, 5 Ben. 4.

[2] The Aurora *v.* The United States, 7 Cr. 382; Thomas *v.* Lane, 2 Sum. 1.

[3] The Boston and Cargo, 1 Sum. 328; The Havre, 1 Ben. 295; Bom *v.* The Hornet, Crabbe 426.

[4] Distilled Spirits, etc., 5 Ben. 4; Treadwell *v.* Joseph, 1 Sum. 390.

[5] U. S. *v.* Haytian Republic, 57 Fed. Rep. 508. Where it is admitted in argument that the facts are substantially as pleaded no amendment will be allowed: Burrill *v.* Crossman, 65 *id.* 104.

[6] Adm. Rule 24; Town *v.* Steamship Western Metropolis, 28 How. Pr. R. 283; The J. E. Trudeau, 54 Fed. Rep. 907.

[7] Newell *v.* Norton, 3 Wall. 257.

stipulation with sureties, to pay all costs and expenses which may be awarded against him, upon a final adjudication of the suit, or by any interlocutory order made during the progress of it.[1] But if the defendants are guilty of no irregularity or wrong in tendering their appearance and pleading to the action, the libellants may waive the right to claim security, and this will not impair the validity of any proceedings in the cause thereafter.[2]

Answer: Verification.

§ 92. In all causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the defendant, if he desires to make a defence to the suit, should make a proper answer to the libel upon the return day of the process, or such other day as the court may upon a proper application assign. The answer should be full, explicit and distinct to each separate article and each separate allegation of the libel, and in the same order as numbered in the libel, and in like manner to each interrogatory propounded at the close of the libel;[3] and it must be on oath or solemn affirmation,[4] except in cases where the matter in dispute does not exceed the sum or value of fifty dollars, exclusive of costs, unless the court shall be of the opinion that for the purposes of justice the general rule should be observed.[5] This rule is applicable to cases on the instance side of the court.[6] If a plea to the jurisdiction is interposed, it must be by the defendant himself in *propria persona*, and on oath, and no third person is permitted to file such a plea.[7]

Exceptions to Libel and Answer.

§ 93. Although there would appear to be no reason why a demurrer to a libel might not be appropriate where it is insufficient in substance, the common mode of testing its sufficiency,

[1] Adm. Rule 25.

[2] Pharo *v.* Smith, 18 How. Pr. R. 47.

[3] Virginia Home Ins. Co. *v.* Sundberg, 54 Fed. Rep. 389.

[4] Adm. Rule 27; Coffin *v.* Jenkins, 3 Story 108.

[5] Adm. Rule 48.

[6] Gammell *v.* Skinner, 2 Gall. 45; Dunlap's Adm. Pr. 209.

[7] The Rambler, Bee's Adm. 9. The district courts may, perhaps, provide by rule for the verification of pleadings by other parties: Adm. Rule 46.

as well as that of an answer, is by exceptions taken thereto.[1] The exceptions in such a case take the place of a demurrer in common law and equity proceedings. The want of sufficiency, fullness, distinctness or relevancy of an answer to the articles and interrogatories in the libel may be excepted to, and if the court shall consider the exceptions well taken it may order the defendant forthwith, or within such time as it may direct, to answer over and pay such costs as may be deemed reasonable.[2]

One of the rules prescribed by the Supreme Court provides: "The libellant may except to the sufficiency or fullness or distinctness or relevancy of the answer to the articles and interrogatories in the libel; and if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, or within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable."[3] Under this rule an exception for impertinence in an allegation of an answer was allowed, where it served no legal purpose and was a mere slur on the libellant.[4]

Exceptions may also be taken to any libel, allegation or answer for surplusage, irrelevancy, impertinence or scandal, which may be referred to a master, and if he shall report the matter so excepted to as objectionable, and this is sustained and allowed by the court, the matter will be expunged at the cost and expense of the party in whose pleading the objectionable matter is found.[5]

Default on Failure to Answer.

§ 94. If the defendant omits or refuses to answer the libel at the time above indicated, the court will adjudge him to be in contumacy and default, and that the libel be taken *pro confesso* against him, and the court will proceed to hear the cause *ex*

[1] After argument of exceptions, the point cannot be raised, that the facts set out in the exceptions are available only by answer: U. S. *v.* Haytian Republic, 57 Fed. Rep. 508. A motion to dismiss a libel *in rem* may be made after full hearing on merits, with testimony and argument: Charleston Bridge Co. *v.* The John C. Sweeney, 55 Fed. Rep. 540.

[2] 2 Conk. Adm. 238; Adm. Rules 24, 28, 36; Town *v.* Steamship Western Metropolis, 28 How. Pr. 283.

[3] Adm. Rule 28.

[4] The Pioneer, Deady 58.

[5] Adm. Rule 36; United States *v.* Barrels of Alcohol, 10 Int. Rev. Rec. 17.

parte and to make such a decree as law and justice may require. But the court may at any time before a final decree, upon the application of the defendant, set aside the default and permit him to answer the libel, upon his paying all the costs of the suit up to the time of granting leave therefor. If the defendant refuses to answer any particular interrogatory, the charge in the libel to which it refers will be taken *pro confesso*.[1] But statements in a libel which contain no claim for damages, and for which no remedy is prayed, need not be answered specifically.[2]

When a Further Answer will be Required; what Defendant May Object to Answer.

§ 95. If the defendant answers, but does not answer fully, explicitly and distinctly to all matters in any article of the libel, the libellant may file exception thereto, and if it is allowed the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.[3] And in all cases where a default is entered, and where an order is entered that the pleadings be taken *pro confesso*, if the court has jurisdiction of the subject-matter and of the parties, and a final decree is entered, the presumption is that all the facts necessary to warrant the decree or judgment were found, if they are sufficiently averred in the pleadings.[4]

But "the defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for crime, or for any penalty, or any forfeiture of his property for any penal offence."[5]

In a proceeding in admiralty by information for a forfeiture, it was held that the claimants should not be required to produce an invoice called for by the United States as libellant, as it might expose them to prosecution and punishment.[6]

[1] Adm. Rule 29; The David Pratt, Ware 509; Miller *v.* The United States, 11 Wall. 268.

[2] The Brig Aldebaran, Olc. Adm. R. 130.

[3] Adm. Rule 30.

[4] Miller *v.* The United States, 11 Wall. 268.

[5] Adm. Rule 31.

[6] The United States *v.* Twenty-eight Packages of Pins, Gilpin 306.

The Defendant May Require the Libellant to Answer Interrogatories.

§ 96. The defendant may also, at the close of his answer, propound to the libellant any interrogatories touching any matters charged in the libel, or any matter of defence set up in his answer, and require the libellant to answer the same upon oath or solemn affirmation, subject to the like exception as to matters which shall expose the libellant to any prosecution, or punishment or forfeiture, as is set forth in the foregoing section. And if the libellant fails to make proper answers to such interrogatories, the court may adjudge him to be in default and dismiss the libel, or may compel proper answers by attachment, or take the subject-matter of the interrogatories *pro confesso* in favor of the defendant, in the same manner and to the same extent as where the defendant refuses to answer interrogatories of the libellant, as the court in its discretion shall deem most fit to promote justice.[1]

When the Verification of an Answer to Interrogatories May be Dispensed with.

§ 97. We have noticed that the general rule is that the answer must be verified, but this may be dispensed with in certain cases. Thus "where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable."[2]

New Facts in the Answer; Practice in Case of.

§ 98. If a defendant in his answer alleges new facts, these are to be treated as denied by the libellant, and no replication, general or special, may be filed, unless allowed or directed by the court on proper cause shown. But the libellant may, within such time after the answer is filed as may be fixed by the court, either by a general rule or by a special order, amend his libel, so as to confess and avoid, or explain, or add to the new matters

[1] Adm. Rule 32; The David Pratt, Gall. 45.
1 Ware 509; Gammell *v.* Skinner, 2

[2] Adm. Rule 33.

set forth in the answer, and the defendant may in like manner, within such time as may be fixed by the court, amend his answer.[1]

Cross-bill, when Filed: Security for Costs.

§ 99. Whenever the defendant has a counter-claim arising out of the same cause of action for which the original libel was filed, he may file a cross-bill therefor;[2] and in such a case the respondents thereto are required to give security in the usual form to respond in damages as claimed in said cross libel, unless the court on cause shown shall otherwise direct; and proceedings upon the original libel will be stayed until such security be given.[3]

Attachment Proceedings: Garnishee.

§ 100. The libellant is entitled to a process of foreign attachment whenever the defendant has concealed himself or absconded from the country, and the goods to be attached are within the admiralty jurisdiction of the court; and it may issue against his goods and chattels, and against his credits and effects in the hands of third persons.[4] And in such cases, if a creditor is garnisheed, he is required to answer on oath or solemn affirmation as to the debts and credits and effects of the defendant in his hands, and to all such interrogatories touching the same as may be propounded to him by the libellant; and if he refuses or neglects so to do, the court may award compulsory process against him. If he admits any debts, credits or effects in his hands, the same shall be held by him liable to answer the result of the suit.[5] It is the duty of the garnishee to put in an answer as required by the garnishment notice. But if he makes default, and judgment is entered against the defendant, execution will issue in the first instance only against the debts, effects and credits of the principal in his hands. If the libellant can satisfy the court, by affidavits or otherwise, that the garnishee has

[1] Adm. Rule 51.

[2] See The Giles Loring, 48 Fed. Rep. 463.

[3] Adm. Rule 53. Electro-Dynamic Co. *v.* The Electron, 48 Fed. Rep. 689; Franklin Sugar Ref. Co. *v.* Funch, 66 *id.* 342. As to the several matters touched upon in the preceding sections, from 89 to 99 inclusive, see 2 Parsons' Sh. and Adm. 361–387.

[4] Manro *v.* Almeida, 10 Wh. 473.

[5] Adm. Rule 37.

sufficient debts, effects or credits of the principal defendant in his hands to satisfy the judgment, he is entitled to an execution against him; or if necessary to have an answer, he may have compulsory process *in personam* to compel the same.[1]

Attached Property in the Hands of a Third Party, when Brought into Court.

§ 101. It is provided by rule that "in cases of mariners' wages, or bottomry, or salvage, or other proceedings *in rem*, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit; and upon failure of the party to comply with the order, may award an attachment or other compulsive process, to compel obedience thereto."[2] In some cases where the court has parted with the possession of the property, on the giving of a stipulation, and justice requires the court to retake the same, and it is in the actual or constructive possession of a person not a party to the stipulation, it can only be done by a monition and not by an execution in the first instance.[3] This is the rule of practice in prize, bottomry and salvage cases as well as in libels for wages.[4]

Where the Libellant does not Appear: Dismissal.

§ 102. We have noticed the practice and the rights of the libellant in case the defendant fails to appear, and it is here appropriate to notice the practice and the rights of the defendant in case the libellant fails to appear. Where the latter does not appear and prosecute his suit according to the course and orders of the court, he will be considered in default and contumacy, and the court will upon the application of the defendants pronounce the suit deserted, and dismiss the same with costs.[5]

[1] Story *v.* Rennell, 1 Sprague 418; Adm. Rule 37. On these points, see also 2 Parsons' Ship. and Adm. 391–3.

[2] Adm. Rule 38.

[3] The Gran Para, 10 Wh. 497.

[4] Shepard *v.* Taylor, 5 Pet. 675; Adm. Rule 38. The question whether a case is made for recall of the property must be determined before final decree on the bond; U. S. *v.* Ames, 99 U. S. 35.

[5] Adm. Rule 39.

A Decree on Default May be Rescinded.

§ 103. Where the matter of a libel shall have been decreed against a defendant, on account of his contumacy and default, the court may, on motion by him and the payment of costs, at any time within ten days after the decree has been entered, rescind the decree and grant a rehearing of the cause. The court may, however, make the rehearing conditional upon the defendant's submitting to such further orders and terms in the premises as it may direct.[1] But a rehearing cannot be had after the term of the court has passed at which the decree was rendered.[2] In this case it is expressly provided that the rehearing may be had only on motion. This should be in writing. And in all cases where a party is entitled to any order or judgment of the court, for a neglect of duty, or a disregard of the rules of pleading or the orders of the court by the adverse party, as where the libellant is entitled to a default on the neglect of the defendant to answer in due time, the proper practice is to file a motion in writing setting forth the facts, and asking the court to take such action as the party may be entitled to.

Proceeds of Property; Deposit of Money.

§ 104. All sales of property under any decree in admiralty must be made by the marshal or his deputy, or other proper officer designated by the court where the marshal is a party in interest, in pursuance of the orders of the court, and it is the duty of the officer making the sale to forthwith pay the same into the registry of the court, to be disposed of according to law; and such moneys must be deposited in some bank designated by the court, and in the name of the court, and can only be drawn out on checks signed by the judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit, and out of what fund in particular it is paid. And it is the duty of the clerk to keep a regular book containing a memorandum and copy of all checks so drawn and the date thereof.[3]

The same rule prevails in cases of interlocutory sales as in those

[1] The New England, 3 Sum. 495; Adm. Rule 40.

[2] The New England, 3 Sum. 495.

[3] Adm. Rules 41 and 42.

made under a final decree;[1] also, where the sale is made by the order of the court on a partial credit. If, in the latter case, payments are to be made in instalments, and notes, bonds or other securities are taken therefor, the creditor has a right to insist that they be brought into court, but for convenience they are sometimes permitted to remain in the hands of the officer.[2]

Party Interested may Intervene for Proceeds.

§ 105. If a party has an interest in any proceeds in the registry, he may intervene by petition and summary proceedings *pro interesse suo* for a delivery thereof to him; and upon due notice thereof to the adverse party, if any, the court will proceed summarily to hear and decide upon the same and decree therein according to law and justice. But if such petition or claim shall be deserted, or if, upon a hearing, it shall be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.[3]

Where a person held a mortgage upon the moiety of a vessel which was afterwards libelled, condemned and sold by process in admiralty, and the proceeds brought into the registry of the court, it was held that he could not file a libel against a moiety of those proceeds, but that his proper course was to appeal as a claimant by a petition for a distributive share of the proceeds.[4]

A party having an interest in the proceeds may intervene, though this involves the settlement of partnership accounts.[5] And the surplus remaining in the registry after the satisfaction of a prior lien creditor may be appropriated to the payment of other liens, on the proper intervention of the holders, but not for the satisfaction of debts arising on contracts of a merely personal character.[6]

The owner and mortgagee may both appear, and by answer or petition claim the proceeds of the ship, after the satisfaction of the claims of a libellant who sues on a bottomry bond.[7]

[1] The Avery and Cargo, 2 Gall. 308.

[2] Walls *v.* Thornton, 2 Brock. 422.

[3] Adm. Rule 43.

[4] Schuchardt *v.* The Angelique, 19 How. 239. But see, in case of mortgage for advances made, Leland *v.* The Medora, 2 Woodb. & M. 92.

[5] The Goldsmith, 1 Newb. 123.

[6] Brackett *v.* The Hercules, Gilp. 184; Harper *v.* The New Brig, *Ibid.* 536. See also The Lottawanna, 21 Wall. 558.

[7] The Panama, Olc. 343.

Matters may be Referred to Commissioners.

§ 106. The court has authority to refer any matters arising during the progress of a suit to one or more commissioners, where it shall deem it expedient or necessary for the purposes of justice; and such commissioners possess all the powers which are usually given to or exercised by masters in chancery in reference to them, and may administer oaths and examine the parties and witnesses touching the premises.[1] And it may thus refer the question of the validity of a bottomry lien and direct the commissioner to ascertain and report the actual constituents of the lien.[2] So, where it appears to the court that the main questions in controversy are in reference to accounts between the parties as master and owner of a vessel, it has been held proper to refer the case to a commissioner.[3]

Bail on Arrest: Imprisonment for Debt.

§ 107. Where a simple warrant of arrest is issued and executed in suits *in personam*, bail is required to be taken by the marshal and the court only in those cases in which it is required by the laws of the state where the arrest is made, upon similar or analogous process issuing from the state courts. And imprisonment for debt is abolished on process issuing out of the admiralty court, in all cases where, by the laws of the state in which the court is held, imprisonment for debt is abolished, upon similar or analogous proceedings issuing from a state court.[4]

Extension of Admiralty Jurisdiction.

§ 108. We have considered those matters essential to confer admiralty jurisdiction on the district courts, from which it will appear that they have jurisdiction of all proceedings in admiralty on maritime contracts and for maritime torts, and that their jurisdiction depending upon locality is not limited, by the rules of admiralty in England, to the high seas and to waters where the tide ebbs and flows, but extends, at least in certain cases, over the inland lakes and navigable rivers. The general practice and mode of procedure in these courts, as courts of admiralty and

[1] Adm. Rule 44.

[2] Shaw *v.* Collier, 18 How. Pr. R. 238.

[3] Shaw *v.* Collier, 28 How. Pr. 238.

[4] Adm. Rule 47. In the case of bail the court will not permit a party to be held to bail in two places at the same time for the same cause of action: Bingham *v.* Wilkins, Crabbe 50.

maritime jurisdiction, is substantially the same as that which obtained in England at the time of the organization of our government.

The term *high seas*, in English admiralty law, embraced not only the seas proper, but all arms, estuaries, harbors, havens and rivers wherever the tides ebbed and flowed, but not any part of said waters that lay within the body of a county. The ebb and flow of the tides in England was the test of the navigability of inland waters, and on this account it was made the limit of admiralty jurisdiction over such waters; and the common law courts, ever jealous of the encroachments of the admiralty, which was a branch of the civil law, succeeded in excluding its jurisdiction from any part of the waters of the sea, even where the tide ebbed and flowed, if it lay within the body of any county, on the ground that in such cases the common law courts and remedies would be ample for the administration of justice, either in suits on contracts or for torts of a maritime character, and that, by the spirit of the English constitution, they came within the powers and jurisdiction of those courts, which secured a trial of issues of fact by a jury, whereas the admiralty practice excluded a trial by jury, the court deciding both questions of law and of fact, which was distasteful to the common law courts and generally to the people.

This limitation does not, as we have observed, apply to the jurisdiction of the district courts of this country sitting in admiralty. It has been expressly held that they could take cognizance of a proceeding in admiralty for a tort committed on a river navigable from the sea, although it occurred above tide water and within the boundary of a county.[1]

The general principles of admiralty law we inherited from the mother country, so far as they were adapted to our circumstances and wants; but the rule limiting the jurisdiction of courts of admiralty to the high seas and to tide waters was not particularly applicable to this country, where we have a chain of large inland lakes and large rivers navigable from the sea for thou-

[1] United States *v.* The Betsey, 1 Cr. 443; Jackson *v.* Steamboat Magnolia, 20 How. 296; Walsh *v.* Rogers, 13 *id.* 283; Ure *v.* Coffman, 19 *id.* 56; Nelson *v.* Leland, 22 *id.* 48; Sturgis *v.* Boyer, 24 *id.* 110; Propeller Commerce, 1 Black 580; Norwich *v.* Wright, 13 Wall. 104.

sands of miles, and whose navigation, in many cases far above tide water, contributes largely to increase the commerce and general business prosperity of the country. Under such circumstances there is no reason for the limitation of admiralty jurisdiction of our national courts to tide waters, and where the reason for the rule ceases the rule itself should cease.

We have noticed that Congress has at different times passed acts to confer jurisdiction in admiralty upon these courts, in such cases, under certain limitations; but it may be questionable whether any such legislation was required in the light of the broad and comprehensive views on this subject expressed by the justices of our Supreme Court.[1]

Embezzlement by the Master of a Vessel; Liability of the Owner Limited.

§ 109. It is provided by section 4283 of the Revised Statutes that "the liability of the owner of any vessel for any embezzlement, loss or destruction by any person of any property, goods or merchandise shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount of the interest of such owner in such vessel and her freight then pending."[2]

In such a case, if there are several freighters or owners of goods, wares and merchandise on the same voyage, and the whole value of the vessel and her freight on the voyage is not sufficient to make compensation to each of them, they can only receive compensation in proportion to their respective losses; and if said owner or owners desire to claim the benefit of such limitation of liability, they may file a libel or petition in any district court of the United States where the ship or vessel may be libelled to answer for such embezzlement, loss, destruction, damage or injury; or if the ship or vessel be not libelled, then in the district court of any district in which the said owner or

[1] The Hine, 4 Wall. 555; The Genesee Chief, 12 How. 443; The Moses Taylor, 4 Wall. 411; The Eagle, 8 *id.* 15; The Steamboat Co. *v.* Chase, 16 *id.* 522. See cases cited in note to § 41 *ante*.

[2] Norwich Company *v.* Wright, 13 Wall. 104; Allen *v.* McKay, 1 Sprague 219.

owners may be sued in that behalf,[1] in which libel or petition they should set forth the facts and circumstances on which such limitation of liability is claimed, and pray proper relief in that behalf; and it is the duty of the court thereupon to cause due appraisement to be made of such ship or vessel and her freight for the voyage, and to make an order for the sale of the same and payment of the proceeds into court, or for the giving of a stipulation, with sureties, for the payment of the amount of the appraised value into court whenever the same shall be so ordered; unless the said owner or owners shall elect to transfer his or their interest in such ship or vessel and freight to a trustee, to be appointed by the court, as provided by section 4285 of the Revised Statutes, in which case the court is required to make an order to that effect; and upon compliance with such order, the court is required to issue a monition against all persons claiming damages for the aforesaid causes, or either of them, citing them to appear before the court and make due proof of their respective claims on or before a certain time to be named in said writ, not less than three months from the issuing of the same. Public notice of such monition is required to be given as in other cases, and such further notice served through the post-office, or otherwise, as the court in its discretion may direct; and the court is further required, on the application of such owner or owners, to make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect to any such claim or claims.[2]

Proof Made Before a Commissioner.

§ 110. The proof of all claims made in pursuance of the monition aforesaid must be made before a commissioner to be designated by the court, subject to the right of any person interested to question or controvert the same. It is the duty of such commissioner, on the completion of said proofs, to make a report of the claims so proven, and after hearing any exceptions thereto, and a confirmation of such report, the moneys paid or

[1] Adm. Rule 57; Rev. Stat. § 4284.

[2] Adm. Rule 54; The Bristol, 4 Ben. 55; The City of Norwich, 1 *id.* 89. As to proceedings and rights under §§ 4284 and 4285, and the admiralty rules above referred to, see *Ex parte* Slayton, 105 U. S. 451; The North Star, 106 *id.* 17; Providence and N. Y. S. S. Co. *v.* Hill Manfg. Co., 109 *id.* 578.

secured to be paid into court as aforesaid, or the proceeds of the vessel, and of the freight (after the payment of the costs and expenses), must be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.[1]

Who May Defend in Such Cases.

§ 111. "In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel, for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said act); *provided*, that in his or their libel or petition he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to limitation of liability under the said act of Congress, or both."[2]

The provisions of the statute above referred to do not affect any remedy which a party may be entitled to against the masters, officers or seamen, for or on account of the damages aforesaid.[3]

Further Proof Taken on Appeal in the Circuit Court of Appeals.

§ 112. In case of an admiralty appeal, further proof might have been taken in the circuit court, by deposition, before some commissioner appointed by that court,[4] pursuant to sections 863,

[1] Adm. Rule 55; Providence and N. Y. S. S. Co., 15 Int. Rev. Rec. 193.

[2] Adm. Rule 56.

[3] Rev. Stat. § 4287.

[4] Adm. Rule 49; Singlehurst *v.* La Compagnie Generale Transatlantique, 50 Fed. Rep. 104; s. c. 1 U. S. App. 126; s. c. 1 C. C. Ap. 487. On an appeal the circuit court of appeals tries the case *de novo*, and deals with questions of costs as if they were original questions: Pettie *v.* Boston Towboat Co., 49 Fed. Rep. 464; s. c. 1 U. S. App. 57; s. c. 1 C. C. Ap. 314. The decree appealed from is vacated and cause heard *de novo*: The Louisville, 154 U. S. 657. Findings of fact by the circuit court are conclusive on appeal. *Ibid.* New evidence should not be admitted where witness testified to same matters in trial below,

864 and 865 of the Revised Statutes, or before the officers therein mentioned. The rule was that the deposition in such cases must be upon oral examination and cross-examination, unless the court in which such appeal was pending, or one of the judges thereof, should, upon motion, allow a commissioner to take the same upon written interrogatories and cross-interrogatories. If taken by oral examination, the adverse party must have been notified by the magistrate before whom it was to be taken, or by the clerk of the court in which the appeal was pending, of the time and place of the taking of the same, and before whom, and that he might appear and put interrogatories if he thought fit; and this notice must have been served on the adverse party or his attorney, allowing time for their attendance after being notified, not less than twenty-four hours, and in addition thereto one day, Sundays exclusive, for every twenty miles travel; but the court where the appeal was pending, or either of the judges thereof, might, upon motion, increase or diminish the length of notice above set forth.[1] If the evidence was so contradictory in a revenue or instance cause as to make a decision difficult, the court might order further proof.[2]

It was held in the Fifth Circuit that under Rule 8, of the Circuit Court of Appeals, providing that "the practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable," the practice in admiralty appeals is not like that formerly existing in the circuit courts under Admiralty Rule 49, but like the Supreme Court practice: and that new evidence may not be taken by deposition *de bene esse*, but only by commission under Supreme Court Rule 12.[3] In other cases, however, it has been held that new evidence may be taken by such depositions.[4]

when no special ground is shown: Oliver *v.* Sirius, 54 Fed. Rep. 188; see also The Glide, 68 *id.* 719: see as to new evidence under circuit court of appeals rules: Ins. Co. of Nth. Am. *v.* The Venezuela, 52 *id.* 873; 3 C. C. Ap. 319; 1 U. S. App. 314.

[1] See also Adm. Rule 49.

[2] The Samuel, 1 Wh. 9. See also The Georgia, 7 Wall. 32; The Ocean Queen, 6 Blatch. 24.

[3] The Beeche Dene, 55 Fed. Rep. 526.

[4] The Havilah, 48 Fed. Rep. 684; The Philadelphian, 60 *id.* 423.

When District and Circuit Courts May Regulate Practice.

§ 113. It is provided by a rule in admiralty that, in all cases not provided for by the rules prescribed by the Supreme Court of the United States regulating the practice in admiralty, the district and circuit courts may regulate the same in said courts respectively, in such manner as they shall deem most expedient for the proper administration of justice.[1]

Appeals to the Circuit Court of Appeals and Supreme Court.

§ 114. Provision is made for appeals from the decisions of a district court to the circuit court of appeals, except in prize causes where the appeal is direct to the Supreme Court of the United States.[2] Copies of the proof in such a case, and of such entries and papers on file as may be necessary on the hearing of the appeal, must be certified up to the appellate court.[3]

Time of Taking Appeals to the Circuit Courts of Appeals.

§ 115. It is provided by statute that no judgment, decree or order of the district court can be reviewed by a circuit court of appeals on writ of error or appeal, unless the writ of error is sued out or the appeal taken within six months after the entry of such judgment, decree or order, except that in all cases in which a lesser time is now by law limited for appeals or writs of error such limit of time shall apply to appeals or writs of error in such cases taken to or sent out from the circuit court of appeals.[4] An appeal to the circuit court of appeals carries up the whole fund, and mere technical errors in the decree not prejudicial to the substantial rights of the parties will be disregarded.[5]

[1] Adm. Rule 46; Beers *v.* Haughton, 9 Pet. 329.

[2] 1 Supp. R. S. 903.

[3] Rev. Stat. § 632.

[4] Act of March 3, 1891, 1 Supp. R. S. 901, establishing circuit courts of appeals; see *post* Chapter XI. on circuit courts of appeals. Rev. Stat. § 635. This provision would appear to supersede Admiralty Rule 45, which was amended May 6, 1872, and required appeals in admiralty causes to be taken while the court was sitting, or within such period as might be designated by a general rule, or by a special order of the court, or in case there was no such rule or order, then within thirty days from the rendering of the decree. For a construction of this rule, see The Neustra Senora de Regla, 17 Wall. 29; Norton *v.* Rich, 3 Mas. 443.

[5] The Wanata, 95 U. S. 600. The circuit court of appeals will not reverse where the question depends on conflicting testimony unless it clearly appears that the decision was against the weight of the evidence: The Parthian, 48 Fed. Rep. 564.

What Must be Certified by the Clerk on Appeals.

§ 116. It is provided by a rule of practice in admiralty as follows:

The clerks of the district courts shall make up the records to be transmitted on appeals, so that the same shall contain the following:

1. The style of the court.

2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

3. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and service thereof, all bail and stipulations, and if any sale has been made, the orders, warrants and reports relating thereto.

4. The libel, with the exhibits annexed thereto.

5. The pleadings of the defendants, with the exhibits annexed thereto.

6. The testimony on the part of the libellant, and any exhibits not annexed to the libel.

7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.

10. The final decree.

11. The prayer for an appeal, and the action of the district court thereon; and no reasons for appeals shall be filed or inserted in the transcript.

The following shall be omitted:

1. The continuances.

2. All motions, rules and orders not excepted to which are merely preparatory for trial.

3. The commissioners to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case so much of either of

them as may be involved in the exception shall be set out. In all other cases it shall be enough to give the name of the witnesses, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

4. Any of the pleading, testimony or exhibits which the parties by their proctors shall by written stipulation agree may be omitted; which stipulation shall be certified up with the record.[1]

The clerk is also required to page the copy of the record, and make an index of the same, and certify at the end thereof, under the seal of the court, that it is a transcript of the record of the district court in the cause named at the beginning of the copy made up as above directed.[2]

Appeals to the Supreme Court.

§ 117. Appeals from the district courts to the Supreme Court in prize causes are required to be taken within thirty days after the rendering of the decree, unless the court previously extends the time for cause shown in the particular case;[3] and they are governed by the same rules, regulations and restrictions as are prescribed by law in cases of writs of error. Where an appeal is taken by both parties, a transcript of the record filed by either in the Supreme Court may be used on both appeals, and both appeals may be heard thereon in the same manner as if the records had been filed by the two appellants in both cases.[4]

[1] Adm. Rule 52.

[2] Adm. Rule 52. See also the Grace Girdler, 6 Wall. 441; The Vaughan, 14 Wall. 258.

[3] Rev. Stat. § 1009. See also The Neustra, 17 Wall. 29.

[4] Rev. Stat. §§ 1012, 1013.

CHAPTER VII.

JUDICIAL CIRCUITS AND ORGANIZATION OF THE CIRCUIT COURTS.

Judicial Circuits.

§ 118. *Sec.* 604, as amended by later statutes. The judicial districts of the United States are divided into nine circuits, as follows:

First. The first circuit includes the districts of Rhode Island, Massachusetts, New Hampshire and Maine.

Second. The second circuit includes the districts of Vermont, Connecticut, and the northern, southern and eastern districts of New York.

Third. The third circuit includes the eastern and western districts of Pennsylvania, and the districts of New Jersey and Delaware.

Fourth. The fourth circuit includes the districts of Maryland and West Virginia, and the eastern and western districts of Virginia, North Carolina and South Carolina.

Fifth. The fifth circuit includes the northern and southern districts of Georgia, Florida and Mississippi, the eastern and western districts of Louisiana, the northern, middle and southern districts of Alabama, and the northern, eastern and western districts of Texas.

Sixth. The sixth circuit includes the district of Kentucky, the northern and southern districts of Ohio, the eastern and western districts of Michigan and the eastern, middle and western districts of Tennessee.

Seventh. The seventh circuit includes the district of Indiana, the northern and southern districts of Illinois and the eastern and western districts of Wisconsin.

Eighth. The eighth circuit includes the districts of Colorado, Nebraska, Minnesota, Kansas, North Dakota, South Dakota,

Wyoming and Utah, the northern and southern districts of Iowa and the eastern and western districts of Missouri and Arkansas.

Ninth. The ninth circuit includes the districts of Oregon, Nevada, Idaho, Montana and Washington, and the northern and southern districts of California.

By an order of the Supreme Court of May 11, 1891, under section 15 of the Circuit Courts of Appeals act of March 3, 1891, the territories of Alaska and Arizona were assigned to the ninth circuit and New Mexico and Oklahoma to the eighth circuit.[1] Appeals from decrees of the court of appeals of Indian Territory must be taken to the circuit court of appeals for the eighth circuit.[2]

JUSTICES ALLOTTED TO CIRCUITS, HOW DESIGNATED.—*Sec.* 605. The words "circuit justice" and "justice of a circuit," when used in this title, shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge," when applied generally to any circuit, shall be understood to include such justice.

ALLOTMENT OF THE JUSTICES TO THE CIRCUITS.—*Sec.* 606. The Chief Justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a Chief Justice or associate justice, or otherwise. If a new allotment becomes necessary at any other time than during a term, it shall be made by the Chief Justice, and shall be binding until the next term and until a new allotment by the court.

CIRCUIT JUDGES.—*Sec.* 607. For each circuit there shall be appointed a circuit judge, who shall have the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit, and shall be entitled to receive a salary at the rate of six thousand dollars a year, payable monthly.[3] Every circuit judge shall reside within his circuit.

An act of March 3, 1887,[4] provides: That there shall be appointed for the second circuit by the President of the United

[1] See 139 U. S. 707.

[2] Act of March 1, 1895, ch. 145, § 11, 28 Stat. L. 693, etc.

[3] Act of July 31, 1894, ch. 174, § 13, 28 Stat. L. 162, 2 Supp. R. S. 218.

[4] Act of March 3, 1887, ch. 347, 24 Stat. L. 492.

States, by and with the advice and consent of the Senate, in addition to the present circuit judge, another circuit judge, who shall have the same qualifications and shall have the same power and jurisdiction therein that the present circuit judge has under existing laws, and who shall be entitled to the same compensation as the present circuit judge: *Provided*, That the applications and proceedings therein provided for by sections 2011–2014 of the Revised Statutes, shall be made and taken before the senior circuit judge of the second circuit; but in his absence or inability to act under said sections, or any of them, such applications and proceedings may be made and had before the junior circuit judge in said circuit.

An act of March 3, 1891,[1] provides: That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

An act of July 23, 1894,[2] provides: That there shall be in the eighth judicial circuit an additional circuit judge, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall possess the same qualifications and shall have the same powers and jurisdiction now prescribed by law in respect to the present circuit judges.

An act of February 8, 1895,[3] provides: That there shall be in the seventh judicial circuit an additional circuit judge, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall possess the same qualifications and have the same power and jurisdiction now prescribed by law in respect to the present circuit judges therein.

An act of February 18, 1895,[4] provides: That there shall be in the ninth judicial circuit an additional circuit judge, who shall

[1] Act of March 3, 1891, ch. 517, § 1, 26 Stat. L. 826.

[2] Act of July 23, 1894, ch. 147, 28 Stat. L. 115.

[3] Act of Feb. 8, 1895, ch. 59, 28 Stat. L. 643.

[4] Act of Feb. 18, 1895, ch. 94, 28 Stat. L. 665.

be appointed by the President, by and with the advice and consent of the Senate, and shall possess the same qualifications and have the same power and jurisdiction now prescribed by law in respect to the present circuit judges therein.

CIRCUIT COURTS, WHERE ESTABLISHED.—*Sec.* 608. Circuit courts are established as follows: One for the three districts of Alabama, one for the eastern district of Arkansas, one for the southern district of Mississippi, and one for each district in the states not herein named; and shall be called the circuit courts for the districts for which they are established.

An act of June 22, 1874,[1] provides: That there shall be and is hereby established a circuit court of the United States for the middle district of Alabama, as said district is now constituted by law, to be held in the city of Montgomery, and a like court for the northern district of Alabama, as said district is now constituted by law, to be held in the city of Huntsville.

An act of June 22, 1874,[2] provides: That said circuit courts shall have and exercise, within their respective districts, the same original powers and jurisdiction as are or may be conferred by law upon the circuit court of the United States for the southern district of Alabama at Mobile.

An act of June 22, 1874,[3] provides: That the circuit court of the United States held at Mobile, Alabama, shall be designated and known as the circuit court of the United States for the southern district of Alabama; and that the fourth section of the act approved March 3, 1873, entitled "An act relating to the circuit and district courts of the United States for the middle and northern districts of Alabama," be and the same is hereby repealed.

CIRCUIT COURTS, BY WHOM TO BE HELD.—*Sec.* 609. Circuit courts shall be held by the circuit justice, or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by any two of the said judges sitting together.

JUSTICES OF THE SUPREME COURT TO ATTEND ONCE IN TWO YEARS.—*Sec.* 610. It shall be the duty of the Chief Justice, and of each justice of the Supreme Court, to attend at least one term

[1] Act of June 22, 1874, ch. 401, § 1; 18 Stat. L 195.
18 Stat. L. 195.
[2] Act of June 22, 1874, ch. 401, § 2, 18 Stat. L 195.
[3] Act of June 22, 1874, ch. 401, § 5,

of the circuit court in each district of the circuit to which he is allotted during every period of two years.

JUDGES MAY SIT APART AND TRY CASES.—*Sec.* 611. Cases may be heard and tried by each of the judges holding a circuit court sitting apart by direction of the presiding justice or judge, who shall designate the business to be done by each.

COURTS HELD AT THE SAME TIME IN DIFFERENT DISTRICTS.—*Sec.* 612. Circuit courts may be held at the same time in the different districts of the same circuit.

CRIMINAL TERMS IN THE SOUTHERN DISTRICT OF NEW YORK.—*Sec.* 611. The terms of the circuit court for the southern district of New York, appointed exclusively for the trial and disposal of criminal business, may be held by the circuit judge of the second judicial circuit and the district judges for the southern and eastern districts of New York, or any one of said three judges; and at every such term held by said judge of said eastern district he shall receive the sum of three hundred dollars, the same to be paid in the manner now prescribed by law for the payment of the expenses of another district judge while holding court in said district.

WHEN DISTRICT JUDGES MAY SIT TO REVIEW THEIR OWN OPINIONS.—*Sec.* 614. A district judge sitting in a circuit court shall not give a vote in any case of appeal or error from his own decision, but may assign the reasons for such decision; *provided*, that such a cause may, by consent of parties, be heard and disposed of by him when holding a circuit court sitting alone. When he holds a circuit court with either of the other judges, the judgment or decree in such cases shall be rendered in conformity with the opinion of the presiding justice or judge.[1]

WHEN SUITS ARE TRANSFERRED FROM ONE CIRCUIT TO ANOTHER.—*Sec.* 615. When it appears in any civil suit in any circuit court that all of the judges thereof who are competent by law to try said case are in any way interested therein, or have been of counsel for either party, or are so related or connected with either party as to render it, in the opinion of the court, improper for them to sit in such trial, it shall be the duty of the court, on

[1] Appeals to the circuit court were abolished by the circuit courts of appeals act of March 3, 1891.

the application of either party, to cause the fact to be entered on the records, and to make an order that an authenticated copy thereof, with all the proceedings in the case, shall be forthwith certified to the most convenient circuit court in the next adjoining state or in the next adjoining circuit; and said court shall, upon the filing of such record and order with its clerk, take cognizance of and proceed to hear and determine the case in the same manner as if it had been rightfully and originally commenced therein; and the proper process for the due execution of the judgment or decree rendered in the cause shall run into and may be executed in the district where such judgment or decree was rendered, and also into the district from which the cause was removed.

CAUSE CERTIFIED BACK.—*Sec.* 616. The circuit justice, or the circuit judge of any circuit, may order any civil cause, which is certified in to any court of the circuit under the provisions of the preceding section, to be certified back to the court whence it came; and then the latter shall proceed therein as if the cause had not been certified from it; *provided*, that if, for any reason, it shall be improper for the judges of such court to try the cause so certified back, it shall be tried by some other judge holding such court, pursuant to the provisions of the next section.

JUSTICES MAY HOLD COURTS OF OTHER CIRCUITS ON REQUEST.—*Sec.* 617. Whenever a circuit justice deems it advisable, on account of his disability or absence, or of his having been of counsel, or being interested in any case pending in the circuit court for any district in his circuit, or of the accumulation of business therein, or for any other cause, that said court shall be held by the justice of any other circuit, he may, in writing, request the justice of any other circuit to hold the same, during a time to be named in the request; and such request shall be entered upon the journal of the circuit court so to be holden. Thereupon it shall be lawful for the justice so requested to hold such court, and to exercise within and for said district, during the time named in said request, all the powers of the justice of such circuit.

WHEN NO JUSTICE IS ALLOTTED TO A CIRCUIT.—*Sec.* 618. Whenever, by reason of death or resignation, no justice is allotted to a circuit, the Chief Justice of the Supreme Court may

make a request as provided in the preceding section, which shall have the effect in like manner until a justice is allotted to such circuit.

CLERKS.—*Sec.* 619, as amended by act of February 6, 1889.[1] All appointments of clerks of circuit courts of the United States shall be made by the circuit judges of the respective circuits in which such circuit courts are or may be hereafter established; and all provisions of law inconsistent herewith are hereby repealed.

An act of August 13, 1888,[2] provides: That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member.

An act of March 3, 1893,[3] provides: That in the Ninth Circuit of the United States, a circuit judge may appoint or remove the clerk of the circuit court for the district in which the circuit judge resides. In all other cases clerks of such courts shall be appointed as provided for by existing laws.

An act of June 22, 1874,[4] provides: That there shall be appointed for each of said circuit courts for said middle and northern districts (of Alabama), by the circuit judge of the circuit, a clerk who shall take the oath and give the bond required by law of clerks of circuit courts, and who shall discharge all the duties and be entitled to all the fees and emoluments prescribed by law for clerks of circuit courts; and the United States marshals for said middle and northern districts shall, respectively, act as marshals for said circuit courts, and the United States district attorney for said districts shall discharge the duties of district attorney in said circuit courts for said middle and northern districts.

An act of February 6, 1889,[5] provides: That there shall be appointed for each of said circuit courts in this act mentioned (in Arkansas, Mississippi, South Carolina and West Virginia),

[1] Act of Feb. 6, 1889, ch. 113, § 3, 25 Stat. L. 655.

[2] Act of Aug. 13, 1888, ch. 866, § 7, 25 Stat. L. 433, etc.

[3] Act of March 3, 1893, ch. 211, par. 8; 27 Stat. L. 675.

[4] Act of June 22, 1874, ch. 401, § 3, 18 Stat. L. 195.

[5] Act of Feb 6, 1889, ch. 113, § 3, 25 Stat. L. 655.

by the circuit court judge of the circuit in which said districts are respectively embraced, a clerk, who shall take the oath and give the bond required by law for clerks of circuit courts, who shall discharge all the duties and be entitled to all the fees and emoluments prescribed by general law. And the marshals of the United States in and for said respective districts shall act as marshals of said circuit courts, and the district attorneys of the United States in and for said respective districts shall discharge the duties of district attorneys in said circuit courts.

An act of April 1, 1892,[1] provides: That there shall be appointed in the eastern district of Arkansas one additional clerk of the district court and one of the circuit court, who shall reside and keep their offices in Texarkana.

CLERKS IN CALIFORNIA.—By the act of August 5, 1886,[2] the circuit and district judges of the southern district of California shall each, respectively, appoint a clerk for their respective courts who shall reside and keep their office at Los Angeles, in said district, and shall receive such fees and compensation for services performed by them, respectively, as are now fixed and limited by law.

—— IN GEORGIA.—By the act of April 25, 1882,[3] hereafter there shall be for each of the two judicial districts of Georgia a judge, district attorney, marshal and clerk to be appointed, commissioned and removed as provided by law for other such officers

—— IN IDAHO.—By the Act of July 3, 1890,[4] there shall be appointed clerks of the circuit and district courts of Idaho who shall keep their offices at the capital of the state.

—— IN IOWA.—An act of June 4, 1880,[5] provides: That the clerk of the district court of Iowa shall be the clerk of the circuit court at all the places where the same is held in said district, except at Des Moines.

By the act of July 20, 1882,[6] there shall be appointed by the judge of the northern district of Iowa, with the approval of the

[1] Act of April 1, 1892, ch. 31, 27 Stat. L. 13.

[2] Act of Aug. 5, 1886, ch. 928, § 8, 24 Stat. L. 308.

[3] Act of April 25, 1882, ch. 87, § 1, 22 Stat. L. 47.

[4] Act of July 3, 1890, ch. 656, § 16, 26 Stat. L. 215, etc.

[5] Act of June 4, 1880, ch. 120, § 4, 21 Stat. L. 155.

[6] Act of July 20, 1882, ch. 312, § 24, 22 Stat. L. 172.

circuit judge of the eighth judicial circuit, a clerk for the district and circuit courts in and for said northern district of Iowa. The persons now acting as clerks for the district of Iowa shall be clerks for the northern district of Iowa.

—— IN KENTUCKY.—*Sec.* 620. In the district of Kentucky, a clerk of the circuit court shall be appointed at each place of holding the court, in the same manner and subject to the same duties and responsibilities which are or may be provided for clerks in independent districts.

—— IN LOUISIANA.—By the act of March 3, 1881,[1] the judge for the western district of Louisiana shall appoint a clerk of the district court in the western district, and a clerk of the circuit court for said district shall be appointed in the same manner as other such clerks are appointed, who shall receive for the services performed by them the same fees and compensation that are allowed to the clerks of such courts holding their sessions in New Orleans, and shall be subject in every respect to the same restrictions and responsibilities.

—— IN MISSOURI.—By the act of February 28, 1887,[2] there shall be appointed in Missouri a clerk for each of the United States courts at Hannibal, Saint Joseph, City of Kansas, and Springfield, and each clerk shall be a resident of the division in which the court of which he is clerk is held; he shall keep an office, and the records, files and documents pertaining to the court of his division, and he shall discharge all the duties and receive the fees required or allowed by law.

—— IN NORTH CAROLINA.—*Sec.* 621. In the western district of North Carolina the circuit and district judges shall appoint three clerks, each of whom shall be clerks both of the circuit and district courts for said western district of North Carolina. One shall reside and keep his office at Statesville, one shall reside and keep his office at Asheville, and the third shall reside and keep his office at Greensborough.

—— IN TEXAS.—By the act of March 1, 1889,[3] the judge of the eastern judicial district of Texas shall appoint a clerk of the court, who shall reside at the city of Paris, in the county of Lamar.

[1] Act of March 3, 1881, ch. 144, § 6, 21 Stat. L. 507.

[2] Act of Feb. 28, 1887, ch. 271, § 5, 24 Stat. L. 424.

[3] Act of March 1, 1889, ch. 333, § 19, 25 Stat. L. 783, etc.

—— IN UTAH.—By the act of July 16, 1894,[1] there shall be appointed clerks of the circuit and district courts of Utah, who shall keep their offices at the capital of said state.[2]

—— IN VIRGINIA.—*Sec.* 622. In the western district of Virginia the circuit and district judges shall appoint four clerks, each of whom shall be clerks both of the circuit and district courts for said district. One of these clerks shall reside and keep his office at Lynchburg, another shall reside and keep his office at Abingdon, another shall reside and keep his office at Danville, and the fourth shall reside and keep his office at Harrisonburg, in said district.

—— IN WISCONSIN.—*Sec.* 623. In the western district of Wisconsin the circuit and district judges shall appoint two clerks, each of whom shall be clerks both of the circuit and district courts for said district. One shall reside and keep his office at Madison, and the other shall reside and keep his office at La Crosse.

DEPUTY CLERKS.—*Sec.* 624. One or more deputies of any clerk of a circuit court may be appointed by such court, on the application of the clerk, and may be removed at the pleasure of judges authorized to make the appointment. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate, and the sureties in his official bond shall be liable; and his executor or administrator shall have such remedy for any such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

DEPUTY CLERKS IN ARKANSAS.—By the act of February 28, 1887,[3] the clerk of the circuit and district courts for the eastern district of Arkansas, shall appoint a deputy for the Texarkana

[1] Act of July 16, 1894, ch. 138, § 14, 28 Stat. L. 107, etc.

[2] There is a similar provision as to Wyoming, by Act of July 10, 1890, ch. 664, § 16, 26 Stat. L. 222, etc.

For provisions as to clerks and deputy clerks in the United States Court in Indian Territory, see Act of March 1, 1889, ch. 333, § 3, 25 Stat. L. 783; and Act of March 1, 1895, ch. 145, § 3, 28 Stat. L. 693.

[3] Act of Feb. 28, 1887, ch. 273, § 3, 24 Stat. L. 428.

division, who shall keep an office open at all times in the city of Texarkana, and shall there keep the records, files and documents pertaining to the courts.

——IN GEORGIA.—By the act of February 15, 1889,[1] in the northeastern division of the southern judicial district of Georgia, no additional clerk or marshal is to be appointed. If in the opinion of the court it shall become necessary, a deputy clerk may be appointed.

By the act of March 3, 1891,[2] the clerks of the district and circuit courts of the western division of the northern judicial district of Georgia shall appoint respectively deputy clerks for the courts for said division.

——IN IDAHO.—By the act of July 25, 1892,[3] the clerks of the circuit and district courts of Idaho shall each appoint a deputy clerk at the place where their respective courts are required to be held in the division of the district in which such clerk shall not himself reside, each of whom shall, in the absence of the clerk, exercise all the powers and perform all the duties of the clerk within the division for which he shall be appointed. The appointment of such deputies shall be approved by the court for which they shall have been respectively appointed, and may be annulled by such court at its pleasure, and the clerks shall be responsible for the official acts and negligence of all such deputies.

——IN ILLINOIS.—By the act of March 2, 1887,[4] each of the clerks of the circuit and district courts in the northern district of Illinois, in addition to his powers to appoint deputies, as now prescribed by law, shall be required to appoint a chief deputy for the court of that division in which he himself may not reside, who shall have all the powers of the clerk in his absence. By § 6, the marshal and clerk for that district shall respectively appoint at least one deputy residing in the southern division, unless he shall reside there himself, and also maintain an office at that place of holding court.

[1] Act of Feb. 15, 1889, ch. 168, § 2, 25 Stat. L. 671.

[2] Act of March 3, 1891, ch. 566, § 4, 26 Stat. L. 1110.

[3] Act of July 25, 1892, ch. 145, § 5, 27 Stat. L. 72.

[4] Act of March 2, 1887, ch. 315, § 5, 24 Stat. L. 442.

By the act of August 8, 1888,[1] the marshal and clerk of the southern district of Illinois shall each, respectively, appoint at least one deputy to reside in the city of Quincy, unless he shall reside there himself, and also maintain an office at that place of holding court.

They shall also appoint deputies to reside in the city of Danville, under the act of July 2, 1890.[2]

——IN INDIANA.—*Sec.* 625. In the district of Indiana a deputy clerk of the circuit court must be appointed for said court held at New Albany, and a deputy clerk for said court held at Evansville, who shall reside and keep their offices at said places respectively. Each deputy shall keep in his office full records of all actions and proceedings in the circuit court held at the same place, and shall have the same power to issue all process from the said court that is or may be given to the clerks of other circuit courts in like cases.

By the act of March 3, 1881,[3] the clerk of the district and circuit courts for the district of Indiana, and marshal and district attorney for said district, shall perform the duties appertaining to their offices respectively for said courts, and said clerk and marshal shall appoint deputies, who shall reside and keep their offices at Fort Wayne, Indiana. The deputies shall keep in their offices such records as appertain to their offices, and the deputy clerk shall keep in his office full records of all actions, proceedings and judgments in said courts.

——IN KANSAS.—By the act of May 3, 1892,[4] the clerks of the circuit and district courts of Kansas, and also the marshal, shall each appoint a deputy, who shall reside and maintain an office at the city of Fort Scott, each of whom shall, in the absence of the clerks or marshal, exercise all the powers and perform all the duties of his principal within the division for which he shall be appointed; *Provided*, that the appointment of such deputies shall be approved by the court for which they shall be respectively appointed, and they may be removed by such court at pleasure, and the clerk and marshal shall be

[1] Act of Aug. 8, 1888, ch. 788, § 2, 25 Stat. L. 387.

[2] Act of July 2, 1890, ch. 651, § 2, 26 Stat. L. 212.

[3] Act of March 3, 1881, ch. 154, § 2, 21 Stat. L. 511.

[4] Act of May 3, 1892, ch. 59, § 4, 27 Stat. L. 24.

responsible for the official acts and neglects of all their deputies.[1]

——IN MARYLAND.—By the act of March 21, 1892,[2] the marshal and the clerk of the district of Maryland shall each respectively appoint at least one deputy to reside in the city of Cumberland, unless he shall reside there himself, and also maintain an office at that place of holding court.

——IN MICHIGAN.—By the act of April 30, 1894,[3] the clerks of the circuit and district courts for the eastern district of Michigan, shall each keep his office at the city of Detroit, and shall each appoint a deputy clerk for said courts held at Bay City, who shall reside and keep his office at that place, and such deputy clerk or clerks shall keep in his office dockets and full records of all actions and proceedings in said circuit and district courts for the northern division of said district held at that place, and shall have the same power to issue all processes from said courts, and perform any other duty that is or may be given to the clerks of other circuit and district courts in like cases.

——IN MINNESOTA.—The provision as to deputies in Minnesota in the act of April 26, 1890,[4] is similar to that with reference to Idaho in the act of July 25, 1892, *supra*.

——IN MISSISSIPPI.—By the act of February 28, 1887,[5] the marshal and clerks of the southern district of Mississippi shall appoint deputies, who shall reside at Vicksburg, and act as marshal and clerk of the courts in place of their principals. By the act of July 18, 1894,[6] the marshal and clerk of that district are to appoint deputies, who shall reside at Meridian.

——IN NORTH DAKOTA.—In the act of April 26, 1890,[7] there is a provision as to deputies in North Dakota similar to that with regard to Idaho in the act of July 25, 1892, *supra*.

[1] There had been a similar provision in the Act of June 9, 1890, ch. 403, § 3, 26 Stat. L. 129, as to the appointment by the clerks of deputies at the city of Wichita.

[2] Act of March 21, 1892, ch. 20, 27 Stat. L. 11

[3] Act of April 30, 1894, ch. 66, § 4, 28 Stat. L. 67.

[4] Act of April 26, 1890, ch. 167, § 5, 26 Stat. L. 72.

[5] Act of Feb. 28, 1887, ch. 279, § 4, 24 Stat. L. 430.

[6] Act of July 18, 1894, ch. 144, § 7, 28 Stat, L. 114.

[7] Act of April 26, 1890, ch. 161, § 6, 26 Stat. L. 67.

——IN SOUTH DAKOTA.—By the act of February 27, 1890,[1] the clerks of the circuit and district courts of South Dakota shall reside and have their principal office at Sioux Falls, and each of them may appoint a deputy to reside and have an office at Pierre and Deadwood.

——IN TENNESSEE.—By the act of June 20, 1878,[2] the clerks of the circuit and district courts of the western district of Tennessee shall appoint deputy clerks for the eastern division of the district, subject to the approval of and annulment by the court.

——IN TEXAS.—By the act of June 3, 1884,[3] there shall be appointed in Texas, in the manner provided by law, a deputy clerk, who shall keep his office at the city of El Paso.

By the act of June 11, 1896,[4] there shall be appointed in the Texas northern judicial district, in the manner required by law, a deputy clerk who shall keep his office at the city of Fort Worth, and also one who shall keep his office at the city of Abilene, and also one who shall keep his office at the city of San Angelo.

——IN WASHINGTON.—There is a provision as to deputies in Washington in the act of April 5, 1890,[5] similar to that in the act of July 25, 1892, *supra*, with reference to Idaho.

——IN WYOMING.—By the act of May 23, 1892,[6] the marshal and clerk of Wyoming shall each, respectively, appoint at least one deputy to reside in the town of Evanston, unless he himself shall reside there, and he shall also maintain an office at that place.

COMPENSATION OF DEPUTY CLERKS.—*Sec.* 626. The compensation of deputies of clerks of the circuit courts shall be paid by the clerks respectively, and allowed in the same manner that other expenses of the clerks' offices are paid and allowed.

COMMISSIONERS.—*Sec.* 627. Each circuit court may appoint, in different parts of the district for which it is held, so many discreet persons as it may deem necessary, who shall be called

[1] Act of Feb. 27, 1890, ch. 21, § 6, 26 Stat. L. 14.

[2] Act of June 20, 1878, ch. 359, par. 9, 20 Stat. L. 206.

[3] Act of June 3, 1884, ch. 64, § 3, 23 Stat. L. 35.

[4] Act of June 11, 1896, ch. 422, § 4, 29 Stat. L. 457.

[5] Act of April 5, 1890, ch. 65, § 5, 26 Stat. L. 45.

[6] Act of May 23, 1892, ch. 77, 27 Stat. L. 39.

"commissioners of the circuit courts," and shall exercise the powers which are or may be expressly conferred by law upon commissioners of circuit courts.[1]

MARSHALS NOT TO BE COMMISSIONERS.—*Sec.* 628. No marshal or deputy marshal of any of the courts of the United States shall hold or exercise the duties of commissioner of any of the said courts.

[1] See Rev. Stat. §§ 2025, 2026. This section has been superseded by the act of May 28, 1896. See chapter on "United States Commissioners" *infra*.

CHAPTER VIII.

JURISDICTION OF THE CIRCUIT COURTS.

Jurisdiction, Original and Appellate.

§ 119. The act of Congress of March 3, 1875, prescribed the original jurisdiction of circuit courts as follows: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects; and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings, except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless suit might have been prosecuted in such court, to recover thereon, if no assignment had been made, except in cases of

promissory notes negotiable by the law merchant and bills of exchange. And the circuit courts shall also have appellate. jurisdiction from the district courts under the regulations and restrictions prescribed by law."[1]

This was amended by the act of March 3, 1887, as corrected by the act of August 13, 1888, to read as follows: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer

[1] Act of March 3, 1875, ch. 137, § 1, 18 Stat. L. 470.

and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law."[1]

The act of 1789[2] provided as follows: "The circuit court shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state; and shall have exclusive cognizance of all crimes and offences cognizable, under the authority of the laws of the United States, except where it is otherwise provided, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ; nor shall any circuit or district court have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in case of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district court under the regulations and restrictions hereinafter provided."

As the provisions of this act were in operation nearly a century, there were many decisions of the federal courts construing their meaning, and these decisions will guide us in the interpretation of the later statutes.

[1] Act of August 13, 1888, ch. 866, § 1, 1 Supp. R. S. 611, 25 Stat. L. 433.

This Act does not apply to defendants in local actions: Greeley *v.* Lowe, 155 U. S. 58; Dick *v.* Foraker, *id.* 404. See § 146 *infra*.

[2] 1 Stat. L. 78.

By the act of March 3, 1887, the circuit courts have concurrent jurisdiction with the Court of Claims in certain cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars.[1]

By the act of March 3, 1891, establishing Circuit Courts of Appeals, the appellate jurisdiction of the circuit courts is abolished.[2] But this extends only to final judgments and does not affect the supervisory jurisdiction of the circuit courts in bankruptcy proceedings.[3]

Suits of a Civil Nature at Common Law or in Equity.

§ 120. The language of the statutes, "all suits of a civil nature at common law or in equity," has been held to embrace all suits at law on contracts and for torts.[4] Under the fifth section of the act of March 3, 1875, prohibiting feigned or collusive suits, for the purpose of creating a case cognizable under that act, the Supreme Court is always apt to look closely into the record to ascertain whether the suit is brought in good faith or not, where there is any room at all to question it.[5] It gives discountenance to friendly suits, especially as a means, by an agreed and general statement, without the fullest disclosure of all the material facts, of testing the constitutionality of a legislative act;[6] nor will it determine a controversy in which the plaintiff in error has become the owner of the suit on both sides.[7]

The phraseology of the statute relating to the removal of causes from the state to the circuit courts is similar to that under consideration, and hence any decision construing the statute in either case is applicable to the other. This provision has been

[1] Act of March 3, 1887, ch. 359, § 2, 24 Stat. L. 505, 1 Supp. R. S. 559. See §§ 5, 6 and 10 for procedure in the district and circuit courts. See §§ 198, 376 *infra*.

[2] Act of March 3, 1891, ch. 517, § 4, 1 Supp. R. S. 901, 26 Stat. L. 826. And see U. S. *v.* Fowkes, 3 U. S. App. 247.

[3] *In re* Starr, 56 Fed. Rep. 142; Hutchins *v.* Briggs, 61 *id.* 498, construing Rev. Stat. § 4986.

[4] Kohl *v.* United States, 91 U. S. 367; Weston *v.* Charleston, 2 Pet. 449; Fouvergne *v.* New Orleans, 18 How. 470.

[5] Hayden *v.* Manning, 106 U. S. 586, and cases cited. And see Cross *v.* Allen, 141 *id.* 528, where jurisdiction was held good, although the transfer was made to make a case for a federal court.

[6] Chic. & G. T. R. Co. *v.* Wellman, 143 U. S. 339.

[7] South Spring Hill Gold Mining Co. *v.* Amador M. G. M. Co., 145 U. S. 300.

held to cover suits by attachment,[1] and suits in replevin and in ejectment.[2] And it embraces a suit in equity, to reform an insurance policy;[3] to annul a will;[4] and special statutory proceedings to confirm a tax title.[5] Also suits involving a construction of a bankrupt act,[6] and to restrain or stay execution of a judgment of a state court.[7]

In Wheeler *v.* Bates[8] it was held that the circuit court of the United States had jurisdiction of an action of forcible entry and detainer under the statutes of Illinois, as a "suit of a civil nature" within the meaning of the act of Congress providing for the original jurisdiction of the circuit courts in "all suits of a civil nature at common law or in equity."[9] So it has cognizance of an action under a statute of a state authorizing the recovery of money lost at gaming or horse-racing;[10] and of a suit between different states for a partition of lands under the statutes of a state;[11] and of a suit against a sheriff for an escape, as well as for other neglects and misdemeanors.[12] But mandamus is not a suit of a civil nature;[13] nor is a proceeding to establish and probate a will;[14]

[1] Barney *v.* Globe Bank, 5 Blatch. 107.

[2] Beecher *v.* Gillett, 1 Dill. 308; Dennistoun *v.* Draper, 5 Blatch. 336; Gibbs *v.* Usher, 1 Holmes 348; *In re* Turner, 3 Wall. Jr. 260; Torry *v.* Beardsley, 4 Wash. 242; Allin *v.* Robinson, 1 Dill. 119. So of *sci. fa.* sur mortgage under state procedure: Black *v.* Black, 74 Fed. Rep. 978. Ejectment cannot be maintained in a federal court on a purely equitable title: Carter *v.* Ruddy, 166 U. S. 493.

[3] Charter Oak Co. *v.* Star Ins. Co., 6 Blatch. 208.

[4] Gaines *v.* Fuentes, 92 U. S. 10. See Oakley *v.* Taylor, 64 Fed. Rep. 245, where an action to cancel a will was held not to come within the provision.

[5] Parker *v.* Overman, 18 How. 137.

[6] Connor *v.* Scott, 3 Cent. L. J. 305.

[7] Watson *v.* Bondurant, 2 Woods. (C. C.) 166.

[8] 6 Biss. 88.

[9] See also Clark *v.* Smith, 13 Pet. 195; Lorman *v.* Clark, 2 McLean (C. C.) 568.

[10] Grant *v.* Hamilton, 3 McLean (C. C.) 100. See also Fritch *v.* Creighton, 24 How. 159; Gibbs *v.* Usher, 1 Holmes 348.

[11] *Ex parte* Biddle, 2 Mason 472.

[12] Mewster *v.* Spaulding, 6 McLean 24.

[13] Riggs *v.* Johnson Co., 6 Wall. 166; Greene Co. *v.* Daniel, 102 U. S. 187, 195; Davenport *v.* Dodge Co., 105 *id.* 237.

[14] *In re* Cilley, 58 Fed. Rep. 977; Copeland *v.* Bruning, 72 *id.* 5; *In re* Foley, 76 *id.* 390. Otherwise, of a proceeding to determine the interpretation of a will already established: Wood *v.* Paine, 66 *id.* 807; Toms *v.* Owen, 52 *id.* 417. And no state has power to pass a statute impairing the general equity jurisdiction of a circuit court to administer, as between citizens of different states, assets of deceased persons within its jurisdic-

nor an assessment proceeding for a city improvement;[1] nor an information in equity to restrain the violation of a state statute forbidding trusts.[2] A statute abolishing the writ of *quo warranto* and substituting a civil action, relieves the old civil remedy of its criminal form and the action becomes a suit of a civil nature.[3]

The term "at common law or in equity," as used in the statute, does not limit the jurisdiction merely to suits which the old common law recognizes as among its fixed and settled proceedings, but it embraces all suits in which legal rights are to be ascertained and determined, as well as rights in equity.[4]

The pleading, practice and mode of procedure in suits at law is governed by the requirements of the statutes of the states, and by the local laws, as expounded by the decisions of the state courts, as we shall hereafter notice more fully; and if the statutes authorize the commencement of a suit to determine a legal right, a circuit court can take jurisdiction of it as a suit at common law, although it may not be strictly a procedure known or authorized by the common law.[5]

If a right to sue exists at common law or by statute, the statutes of a state cannot limit the right of recovery to a state court, but it may in such cases be enforced in the proper federal court having jurisdiction under the provisions of the foregoing section.[6]

In equity suits, the jurisdiction, practice and procedure is coextensive with and governed by the principles, rules and usages of courts of equity in England, and cannot be regulated or controlled by the jurisprudence of the state within which the suit is brought;[7] and although circuit courts, as courts of equity, may

tion: Hayes *v.* Pratt, 147 U. S. 557, 570.

[1] *In re* Chicago, 64 Fed. Rep. 897.

[2] Maloney *v.* Amer. Tobacco Co., 72 Fed. Rep. 801.

[3] Ames. *v.* Kansas, 111 U. S. 449.

[4] Kohl *v.* U. S., 91 U. S. 367; U. S. *v.* Block, 3 Bliss. 208. The former suits include all cases involving "legal" rights, hence a non-resident defendant may remove a suit under a statute giving a right of action for death by wrongful act: Brisenden *v.* Chamberlain, 53 Fed. Rep. 307.

[5] United States *v.* Block, 3 Biss. 208; Railway Company *v.* Whitton, 13 Wall. 270.

[6] Parsons *v.* Lyman, 5 Blatchf. 170; Livingston *v.* Jefferson, 1 Brock. 203. A non-resident who has elected to bring suit in a state court cannot thereafter bring one on the same cause of action in a federal court: Hughes *v.* Green, 75 Fed. Rep. 691.

[7] Rev. Stat. § 913, Equity Rule 90; State of Pennsylvania *v.* Wheeling, etc., Br. Co., 18 How. 421; Robinson *v.* Campbell, 3 Wh. 212; Dodge *v.*

make rules and regulations for the practice, proceedings and process, mesne and final, in their respective circuits they cannot be inconsistent with the general principles or usages of the High Court of Chancery in England, or with the rules prescribed by the Supreme Court of the United States.[1] It has therefore been held that the circuit courts as courts of equity have no jurisdiction of creditors' bills by simple contract creditors;[2] nor of an action of trespass to try an equitable title.[3] On the other hand they have been held to have jurisdiction of trusts for the benefit of creditors;[4] of suits for the partition of land;[5] and of a bill to set aside an award on the ground of misconduct of the arbitrators.[6]

The fact that there may be no state courts of equity, or statutory provisions providing for them, does not affect the right of

Wolsey, 18 How. 331; Barber *v.* Barber, 21 *id.* 582; Livingston *v.* Story, 9 Pet. 632; Payne *v.* Hook, 7 Wall. 425; Fletcher *v.* Morey, 2 Story 555; Morrow Shoe Manufg. Co. *v.* New England Shoe Co., 60 Fed. Rep. 341; Amer. Assn. *v.* Eastern Ky. Land Co., 68 *id.* 721; England *v.* Russell, 71 *id.* 818; Ray *v.* Tatum, 72 *id.* 112; North. Pac. R. Co. *v.* Paine, 119 U. S. 561; McConihay *v.* Wright, 121 *id.* 201; Whitehead *v.* Shattuck, 138 *id.* 146; Scott *v.* Neely, 140 *id.* 106; Cowley *v.* North. Pac. R. Co., 159 *id.* 569; Miss. Mills *v.* Cohn, 150 *id.* 202. In Cates *v.* Allen, 149 *id.* 451, it is held that the fact that a court of chancery may summon a jury cannot be regarded as the equivalent of the right of a trial by jury, secured by the seventh amendment to the Constitution. But an equitable remedy that does not infringe on trial by jury may be adopted by the federal court: Grether *v.* Wright, 75 Fed. Rep, 742. As to the administering of estates, see Yonley *v.* Lavender, 21 Wall. 276; Tate *v.* Norton, 94 U. S. 746; Chewett *v.* Moran, 17 Fed. Rep. 820; Hartman v. Fishbeck, 18 *id.* 291; Lawrence *v.* Nelson, 143 U. S. 215; Byers *v.* McAuley, 149 *id.* 608.

[1] Bank of U. S. *v.* White, 8 Pet. 262; *Ex parte* Poultney *v.* City of Lafayette, 12 *id.* 472; The Philadelphia, etc., R. Co. *v.* Stimpson, 14 *id.* 448. But this rule affects practice only, and does not apply in determining questions of jurisdiction: Lewis *v.* Shainwald, 48 Fed. Rep. 492.

[2] Hollins *v.* Brierfield Coal & Iron Co., 150 U. S. 371; Atlanta and F. R. Co. *v.* West. R. Co., 2 U. S. App. 227; U. S. *v.* Ingate, 48 Fed. Rep. 251; Morrow Shoe Manufg. Co. *v.* New England Shoe Co., 60 *id.* 341; England *v.* Russell, 71 *id.* 818. See Merchants' Nat. Bk. *v.* Chattanooga Constru. Co., 53 *id.* 314; Buckeye Engine Co. *v.* Donau Brewing Co., 47 *id.* 6.

[3] Kircher *v.* Murray, 54 Fed. Rep. 617.

[4] Thompson *v.* Rainwater, 4 U. S. App. 217.

[5] Daniels *v.* Benedict, 50 Fed. Rep. 347. But not where the plaintiff's title is denied: Amer. Assn. *v.* Eastern Ky. Land Co., 68 *id.* 721.

[6] Mo., K. and T. R. Co. *v.* Elliott, 56 Fed. Rep. 772.

the proper federal courts to take cognizance of equity suits; and they are bound to proceed in such cases according to the principles and usages of courts of equity as distinguished from courts of law.[1] But we will hereafter more particularly point out the practice and procedure in this court, in suits at law and in equity.

Injunctions of State Courts Prohibited.

§ 121. It may here be observed that writs of injunction by the courts of the United States, to stay proceedings in the state courts, are expressly prohibited by the Revised Statutes, except in cases authorized by any law relating to proceedings in bankruptcy.[2] As the bankrupt law, then in existence, has since been repealed, the exception has no virtue, but the general provision remains in full force and effect.[3] A state court cannot enjoin a United States court, nor can a United States court enjoin a state court.[4] But where the federal courts have jurisdiction of the parties, they may issue proper process to protect one of them from fraudulent judgments obtained in state courts, the process operating upon parties and not directly upon the state courts.[5]

The Value of the Matter in Dispute.

§ 122. In construing the provisions of the statute relating to the value of the matter in dispute, it has been held that, in an action upon a money demand, the value of the matter in controversy is the debt claimed, as stated in the body of the declaration, and not merely the damages alleged in the statement, or

[1] Gaines *v.* Relf, 15 Pet. 9; Livingston *v.* Story, 9 *id.* 632; *Ex parte* Whitney, 13 *id.* 404. By § 3 of the act of August 13, 1888, receivers or managers of property appointed by federal courts may be sued without previous leave of court, but such suits are subject to the general equity jurisdiction of the courts appointing them. See Tex. and Pac. R. Co. *v.* Cox, 145 U. S. 593; Centr. Trust Co. *v.* Chattanooga R. and C. R. Co., 68 Fed. Rep. 685. A circuit court cannot appoint a receiver for a corporation in another state: Tex. and Pac. R. Co. *v.* Gay, 86 Tex. 571.

[2] Rev. Stat. § 720.

[3] The Bankrupt Act of 1867 was repealed by an act of June 7, 1878, which took effect September, 1878, except as to matters then pending in court: Acts of 45th Cong., 19 Stat. L.

[4] Riggs *v.* Johnson Co., 6 Wall. 166; Amy *v.* Supervisors, 11 *id.* 136; Dial *v.* Reynolds, 96 U. S. 340.

[5] Marshall *v.* Holmes, 141 U. S. 589. And this is in accord with the general doctrine. 2 Kent Com. (13th ed., Holmes) 463, note.

the amount claimed in the prayer for judgment at its conclusion.[1] The court will look to the amount claimed in the body of the complaint, and will not be governed by the amount for which judgment is prayed; and the amount of all that is claimed in all the counts of the declaration upon all the causes of action which are properly joined will be considered in determining the amount in controversy.[2] But if the court sees from the whole record that under no aspect of the case could the whole amount of the claim be recovered, jurisdiction cannot be taken.[3]

But where a bill was filed jointly by several complainants for an injunction to restrain the collection of taxes on the property of the several complainants, levied for the purpose of constructing a railroad, and the amount severally levied upon their property was less than five hundred dollars, but collectively it exceeded that sum, the court held that as to each of the complainants it was necessary that the amount in dispute should exceed five hundred dollars; and that although they might join in the proceeding to enjoin the collection of the tax, the interest of each was several; and that when it became necessary to aggregate the tax the several complainants were required to pay, to make the amount of five hundred dollars, it was insufficient to confer jurisdiction.[4] And a circuit court has no jurisdiction over a bill in equity to enjoin the collection of taxes from a railroad com-

[1] Lee *v.* Watson, 1 Wall, 337. That the amount of the *bona fide* claim is the jurisdictional amount, see Peeler *v.* Lathrop, 2 U. S. App. 40; Riggs *v.* Clark, 71 Fed. Rep. 560; Wheeler, etc., Co. *v.* Pickham, 69 *id.* 419. In a suit for an injunction, the value of the object to be gained is the test and not the damages sustained: Miss. & Mo. R. Co. *v.* Ward, 2 Black (U. S.) 485; Reynolds *v.* Burns, 141 U. S. 117; Rainey *v.* Herbert, 3 U. S. App. 592. But the amount of a tax is the jurisdictional amount, not the value of the property taxed: Linchen Ry. Transfer Co. *v.* Pendergrass, 70 Fed. Rep. 1.

[2] Judson *v.* Macon County, 2 Dill. 213. And the fact that there is a good defence apparent on the plaintiff's pleadings, and that the residue is less than $2000 does not oust jurisdiction: Schunk *v.* Moline, M. & S. Co., 147 U. S. 500. And see Ins. Co. of N. Amer. *v.* Svendsen, 74 Fed. Rep. 346. So the objection of multifariousness may be waived by a failure to make it in the pleadings: Fitchett *v.* Blows, 74 Fed. Rep. 47. See also Barry *v.* Edmunds, 116 U. S. 550, as to the legal certainty required to be shown by the facts of the record.

[3] Gorman *v.* Havird, 141 U. S. 206.

[4] King *v.* Wilson, 1 Dill. 555; Adams *v.* Board of Commissioners, McMahon 235; Bank of U. S. *v.* Moss, 6 How. 31.

pany when distinct assessments in separate counties, no one of which amounts to two thousand dollars and for which separate suits must be brought, are joined in the bill and aggregate over two thousand dollars.[1] The matter in dispute must exceed two thousand dollars, and it is not sufficient that it equal that amount. Hence it is necessary to aver, in the body of the declaration, facts showing that it exceeds that sum.[2]

It was formerly sufficient, however, if the amount in dispute exceeded five hundred dollars with interest due on the obligation sued on.[3]

The subject-matter of the suit must be something of a pecuniary value, and susceptible of a pecuniary estimate; and this necessarily excludes all controversies of a civil character relating to the custody of children, and those involving the right of personal freedom, as these matters are not susceptible of a pecuniary valuation.[4]

[1] Walter *v.* Northeastern R. Co., 147 U. S. 370; Northern Pac. R. Co. *v.* Walker, 148 *id.* 391; Fishback *v.* West. Un. Telegr. Co., 161 *id.* 96. See also Auer *v.* Lombard, 72 Fed. Rep. 209; Citizens' Bank *v.* Carmon, 164 U. S. 319. But in a suit to restrain the State Board of Appraisers from assessing an illegal tax against a telegraph company in several counties, it was held that the court had jurisdiction, though the assessment did not amount to $2000 in any single county, as, the action being against the Board, the whole amount to be certified was the amount in controversy: West. Un. Tel. Co. *v.* Poe, 61 Fed. Rep. 449. And see Hartford Fire Ins. Co. *v.* Bonner Mercantile Co., 56 *id.* 378.

[2] Lee *v.* Watson, 1 Wall. 337; Gordon *v.* Longest, 16 Pet. 97; Kanouse *v.* Martin, 15 How. 198; Bennett *v.* Butterworth, 8 *id.* 124; Payton *v.* Robertson, 9 Wh. 527; United States *v.* McDowell, 4 Cr. 316; Postmaster General *v.* Cross, 4 Wash. (C. C.) 326; Hartshorn *v.* Wright, 1 Pet. (C. C.) 64; King *v.* Wilson, 1 Dill. (C. C.) 555; Walker *v.* The United States, 4 Wall. 163; Cabot *v.* McMaster, 61 Fed. Rep. 129. That the amount need not always be due when suit is brought, see Schunk *v.* Moline M. & S. Co., 147 U. S. 500.

[3] Bank *v.* Daniel, 12 Pet. 32. The same doctrine was held in cases of the removal of causes from the state courts: see McGinnity *v.* White, 3 Dill. 350; Merrill *v.* Petty, 16 Wall. 338. But interest is excluded under the Act of 1888. As to what is "interest" under this act, see Edwards *v.* Bates County, 163 U. S. 269; Home and For. Ins. Co. *v.* Ray, 69 Fed. Rep. 657. See also Coolidge *v.* Ray, 75 *id.* 39.

[4] Lee *v.* Lee, 8 Pet. 44; Barry *v.* Mercien, 5 How. 103; Sparrow *v.* Strong, 3 Wall. 97; Gaines *v.* Fuentes, 92 U. S. 10; Pratt *v.* Fitzhugh, 1 Black. 271; DeKraft *v.* Barney, 2 *id* 704; Green *v.* U. S., 9 Wall. 655; Rison *v.* Cribbs, 1 Dill. 181; Elgin *v.* Marshall, 106 U. S. 578.

The requisite value of the matter in controversy is a jurisdictional fact, and it must, necessarily, be averred in the declaration or bill. There are no presumptions in favor of the jurisdiction of the federal courts, as they are specially constituted with jurisdiction in certain cases; and the facts upon which it rests must appear in some form in the record of all suits prosecuted before them. They have no jurisdiction except such as the statute confers;[1] and as the jurisdiction of the court depends upon a statute, if the statute is repealed, this takes away the jurisdiction of the court from the time of the repeal, even though there may be suits pending, unless there is a reservation of such suits.[2] Under the act of 1888, the provision that the jurisdictional amount must exceed two thousand dollars does not apply to cases in which the United States are plaintiffs, nor to controversies between citizens of the same state claiming lands under grants of different states.[3] And the act of 1888 does not repeal the act of March 3, 1881,[4] giving the right to commence suit in trade-mark cases without alleging the amount in controversy.[5]

Suits Arising Under the Constitution or Laws of the United States.

§ 123. One of the grounds of jurisdiction of the circuit courts is that the matter in dispute arises "under the Constitution or laws of the United States, or treaties made . . . under their authority." If the question presented to the court is whether a state law is in conflict with any provision of the federal Constitution, this would evidently be within the provisions of the act, and give the circuit courts original jurisdiction. In such a case

[1] Sheldon *v.* Sill, 8 How. 441; United States *v.* Eckford, 6 Wall. 484; Carey *v.* Curtis, 3 How. 236; Wisconsin *v.* Duluth, 2 Dill. 206; Hubbard *v.* Northern R. Co., 3 Blatch. 84; Dred Scott *v.* Sanford, 19 How. 393. That there is no common law jurisdiction in the federal courts and that they must look to the state laws when common-law rights are asserted, see Wheaton *v.* Peters, 8 Pet. 591; Manchester *v.* Mass, 139 U. S. 240. See also, as to rights under state laws, Schunk *v.* Moline M. & S. Co., 147 U. S. 500; Wyman *v.* Mathews, 53 Fed. Rep. 678; Single *v.* Scott Paper Manuf'g Co., 55 *id.* 553.

[2] Insurance Co. *v.* Ritchie, 5 Wall. 541; Norris *v.* Crocker, 13 How. 429.

[3] U. S. *v.* Sayward, 160 U. S. 493; U. S. *v.* Flournoy Live Stock & Real Est. Co., 71 Fed. Rep. 576.

[4] Act of March 3, 1881, ch. 138, 1 Supp. R. S. 322, 21 Stat. L. 502.

[5] Glotin *v.* Oswald, 65 Fed. Rep 151.

a correct decision would depend upon a proper construction of the Constitution, and this would give the proper circuit court jurisdiction.[1] If a state law is in conflict with the Constitution of the United States, and a state officer is about to execute it, this would be a proper case for the exercise of the jurisdiction of a circuit court to restrain him. And the court may proceed in such a case to a decree against an officer of the state in all respects as if the state were a party to the record.[2] It is not sufficient that in the course of the litigation it may become necessary to construe the federal Constitution or laws, but the decision must depend upon the construction.[3] The citizenship of the parties is immaterial in these cases.[4]

[1] Cohens *v.* Virginia, 6 Wh. 264; Owings *v.* Norwood, 5 Cr. 344; Osborne *v.* Bank of U. S., 9 Wh. 738. See also Cook *v.* Moffatt, 5 How. 295; Abb. Nat. Dig. title "Const. Law." A suit against the receivers of a corporation incorporated by Act of Congress arises under the Constitution and laws of the United States: Tex. & Pac. R. Co. *v.* Cox, 145 U. S. 593. And see South. Kan. R. Co. *v.* Briscoe, 144 *id.* 133; Bartley *v.* Hayden, 74 Fed. Rep. 913; Walker *v.* Windsor Nat. Bk., 56 *id.* 76; Grant *v.* Spokane Nat. Bk., 47 *id.* 673. The fact that the consul of a foreign nation is a party does not give jurisdiction: Pooley *v.* Luco, 72 Fed. Rep. 561.

[2] Osborne *v.* Bank of U. S., 9 Wh. 738; Dodge *v.* Wolsey, 18 How. 331; State Bank *v.* Knoop, 16 *id.* 369; Jefferson Bank *v.* Skelly, 1 Black. 436; Ohio L. and F. Co. *v.* Debold, 18 How. 380; Davis *v.* Grey, 16 Wall. 203.

In Bennett *v.* Boggs, 1 Bald. 60, the question of the constitutionality of a state law was the matter in controversy. It was held that the legislature of a state had paramount authority to legislate and regulate its fisheries unless restrained by its constitution, and that a common law right of fishery may be taken away by legislative prohibition, as it is not a right founded upon contract, or secured by the federal or state constitutions. See also Livingstone *v.* Moore, 1 Bald. 424. A state legislature has no right to deny to a person or a corporation access to the federal courts, unless he or it comply with certain state laws regulating business: Barling *v.* Bk. of Brit. N. Amer., 7 U. S. App. 194.

[3] Gold Washing & W. Co. *v.* Keyes, 96 U. S. 199; Germania Ins. Co. *v.* Wisconsin, 119 *id.* 473. But the pleadings need not show what clause of the Constitution is in question: Crystal Springs L. & W. Co. *v.* Los Angeles, 76 Fed. Rep. 148, which see also for interpretation of suit "arising under treaties."

[4] King *v.* Cornell, 106 U. S. 395; Wilder *v.* Union Nat. Bk., 9 Biss. 178.

Controversy between Citizens of Different States.

§ 124. If the suit and the amount in dispute is within the provisions of the statute, and it appears from the declaration or bill that the "controversy is between citizens of different states," the circuit court has original jurisdiction.

Under similar provisions of the Judiciary Act (1789), it was held that the statute meant that each distinct interest should be represented by parties, all of whom might sue and be sued in the federal courts; and that where the interest of either party was joint, each of the persons interested must have the requisite citizenship to sue or be sued in those courts, and that the circuit courts would have no jurisdiction if some of the defendants were citizens of the same state with the plaintiffs.[1]

And under a subsequent act, which provided "that where, in any suit at law or in equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit," it was held that the joinder of a defendant, who was a citizen of the same state with the plaintiff, and who was duly served with original process, with others who were not citizens of the same state, would oust the court of jurisdiction.[2] The inquiry as to citizenship is determined by the condition of the parties at the commencement of the suit.[3]

[1] Strawbridge *v.* Curtis, 3 Cr. 267; Ward *v.* Arredondo, 1 Paine (C. C.) 410. See also Commercial Bank *v.* Slocomb, 14 Pet. 60; Coal Co. *v.* Blatchford, 11 Wall. 172; Mangels *v.* Donau Brewing Co., 53 Fed. Rep. 513.

[2] Act of Feb. 28, 1839, 5 Stat. L. 321; Ketchum *v.* Farmers', etc., Co., 4 McLean 1. See also Coal Co. *v.* Blatchford, 11 Wall. 172; Case of the Sewing Machine Co., 18 *id.* 553; Doremus *v.* Bennett, 4 McLean 224.

[3] Anderson *v.* Watt, 138 U. S. 694; Brigel *v.* Tug River Coal and Salt Co., 73 Fed. Rep. 13.

One of the provisions for jurisdiction under the acts of 1875 and 1888 is that there "be a controversy between citizens of different states." In construing this language, the Supreme Court has held that, if there is a controversy between citizens of different states, about which the suit is brought, it is immaterial as to the position of the parties on the record or in the pleadings as plaintiffs or defendants; and that in determining the question of jurisdiction the court might "ascertain the real matter in dispute and arrange the parties on one side or other of that dispute; and that if in such arrangement it appeared that those on one side were all citizens of different states from those on the other, jurisdiction might be entertained and the cause proceeded with."[1] A collusive arrangement to make parties to the suit citizens of different states does not give jurisdiction.[2]

Who are Citizens.

§ 125. A citizen, in the sense of the statute, is one who resides in, and is an inhabitant of, the state. It is evident that he need not possess the qualfications which would enable him to exercise the elective franchise or hold real estate. Those who have resided in and been inhabitants and citizens of one state, within the meaning of the statute, may remove to another state to remain either temporarily or permanently, and various matters connected therewith may properly be considered in determining the question of citizenship. It has been held that, on the removal of a citizen from one state to another, citizenship may depend upon his intentions. The exercise of the right of suffrage in such a case in the state where he resides would perhaps ordinarily be conclusive upon the subject; but even where the right of suffrage has not been exercised, the acquiring of the right so

[1] The Pacific Railroad *v.* Ketchum, 101 U. S. 290. The same doctrine was maintained in Removal Cases, 100 *id.* 457, the latter construing the same language in the second section of the Act of 1875 relating to the removal of causes. See also Kildare Lumber Co. *v.* Nat. Bank of Commerce, 69 Fed. Rep. 2; Oberlin College Trustees *v.* Blair, 70 *id.* 414. And see cases in 2 Danforth U. S. Sup. Ct. Dig., tit. "Jurisdiction," pp. 283–5.

[2] Lehigh Min. & Manufg. Co. *v.* Kelly, 64 Fed. Rep. 401; Bowdoin College *v.* Merritt, 63 *id.* 213. See Crawford *v.* Neal, 144 U. S. 585; Cross *v.* Allen, 141 *id.* 528.

to do, accompanied by such acts as indicate a permanent location, would be quite satisfactory on this question. And where an individual who is a citizen of the United States has resided in a state for a considerable length of time, during which he has there been engaged in business, he may well be presumed to be a citizen of such state, unless circumstances appear to the contrary.[1]

Under the Judiciary Act of 1789 it was held that a citizen of the District of Columbia was not a citizen of a state within the meaning of that act, and that he could not maintain an action against a citizen of a state in a circuit court.[2] Nor could a citizen of a territory, under that act, sue a citizen of a state in the federal courts, when the jurisdiction depended upon citizenship of the parties; as a citizen of a territory is not a citizen of a state within the meaning of the statute.[3] The circuit courts have no jurisdiction of a case, either at law or in equity, in which the plaintiff and defendant are citizens of the same state, as neither the judiciary acts of Congress nor the Constitution of the United States con-

[1] Prentiss *v.* Barton, 1 Brock. 389; Cooper *v.* Galbraith, 3 Wash. 546; Gardner *v.* Sharp, 4 *id.* 609; De Wolf *v.* Rabaud, 1 Pet. 476; Shelton *v.* Tiffin, 6 How. 163. There was, however, an exception to this rule in case of negroes of the African race, before slavery in this country was abolished. In 1856 the Supreme Court of the United States determined that a free negro of the African race whose ancestors were brought to this country and sold as slaves could not be a citizen within the meaning of the federal judiciary acts: Dred Scott *v.* Sanford, 19 How. 393.

[2] Hepburn *v.* Ellzey, 2 Cr. 445; Barney *v.* Baltimore City, 6 Wall. 280. But see Sere *v.* Pilot, 6 Cr. 332; Railroad Co. *v.* Harris, 12 Wall. 65, even though a competent person be joined as co-plaintiff: Hooe *v.* Jamieson, 166 U. S. 395.

[3] New Orleans *v.* Winter, 1 Pet. 91; Snead *v.* Sellers, 66 Fed. Rep. 371. Where the plaintiff was a native of New York, but had resided and done business in Canada for thirty years, and resided there at the time of bringing this suit and had taken an oath of allegiance to the Queen of Great Britain, and the defendant was a citizen of Canada, it was held that the circuit court of New York had no jurisdiction of the case, as the plaintiff was not a citizen of the state. This suit was, of course, based upon the citizenship of the plaintiff and the alienage of the defendant: Prentiss *v.* Brennan, 2 Blatch. (C. C.) 162.

fers jurisdiction in such cases.[1] A state itself is not a "citizen;"[2] nor is an Indian nation.[3]

Parties, merely Nominal or Formal.

§ 126. If the real controversy is between citizens of different states, the fact that there are merely formal or nominal parties to it, who have not the requisite citizenship, does not affect the jurisdiction of the court. "Where the real and only controversy is between citizens of different states, or an alien and a citizen, and a plaintiff by some positive rule of law is compelled to use the name of another to perform some ministerial act, who has not and never had any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the real controversy and litigation before them exists."[4] So where certain parties had only a nominal interest, and they resided beyond the jurisdiction of the

[1] North Carolina *v.* Dewey, 1 Hughes 133; Gale *v.* Babcock, 4 Wash. (C. C.) 199; Osborne *v.* U. S. Bank, 9 Wh. 738; Cohen *v.* Virginia, 6 Wh. 264; Martin *v.* Hunter, 1 *id.* 237. If property of a state is in the hands of an officer or agent as trustee, and the officer or agent is within the jurisdiction of the court, it may take jurisdiction of the suit without requiring the state to be a party: Swasey *v.* North Carolina R. Co., 1 Hughes 17; Osborne *v.* U. S. Bank, 9 Wh. 738.

[2] Minn. *v.* Guaranty Trust & Safe Dep. Co., 73 Fed. Rep. 914. But a circuit court has jurisdiction of a suit in the name of the state in which the circuit is situated, on relation of a citizen of another state, to enforce the obligations of a bond given by citizens of the former state for faithful performance of his duties by a municipal officer of that state: Ind. *v.* Glover, 155 U. S. 513.

[3] Thebo *v.* Choctaw Tribe, 66 Fed. Rep. 372. Nor an unnaturalized Indian: Paul *v.* Chilsoquie, 70 *id.* 401. Under the Act of July 4, 1884, ch. 179, 23 Stat. L. 73, certain courts of the United States in Texas, Arkansas and Kansas have concurrent jurisdiction, without reference to amount or to citizenship, over all controversies arising between the Southern Kansas Railway Company and the inhabitants of the Indian nations and tribes through whose territory that railway runs: Southern Kan. R. Co. *v.* Briscoe, 144 U. S. 133.

And by the Act of August 15, 1894, ch. 290, § 5, 2 Supp. R. S. 246, 28 Stat. L. 286, all persons of Indian blood claiming land under any allotment Act or grant of Congress may commence or defend any suit in relation to their right in the proper circuit court.

[4] Opinion of Mr. Justice Clifford in Walden *v.* Skinner, 101 U. S. 577. See also Mr. Justice Miller in Arapahoe Co. *v.* Kansas Pacific R. Co., 4 Dill. 277; Harvey *v.* The Illinois Mid. R. Co., 7 Biss. 103; Davis *v.* Gray, 16 Wall. 203; Weed Sewing Machine Co. *v.* Wicks, 3 Dill. 261; Cunningham *v.* Macon & B. R. Co., 109 U. S. 446, 455.

court, it was held error to dismiss the bill on the ground that they were not made parties, where all the parties who had a beneficial interest were in court. The court, in such a case, should proceed to a decree against the defendants if equity requires it.[1] If the parties are not indispensable, and the court has no jurisdiction over them for want of proper citizenship, they may be dismissed, if a decree can be made without prejudice to their rights, and the court may retain jurisdiction as to the other parties to the bill.[2]

The Proper Citizenship of the Parties Should Appear in the Record.

§ 127. It is a general if not a universal rule that where jurisdiction depends upon citizenship, the proper citizenship of the parties should appear in some manner in the record, as the federal courts are all courts of defined and limited jurisdiction, and no presumptions will be made in favor of them.[3] Under the act of 1789, in cases where jurisdiction depended upon citizenship, it was necessary for the declaration or bill to show not only that the parties were citizens of different states, but that one of them was a citizen of the state where the suit was brought. And this is also the rule under the act of 1888.[4] But under the act of March 3, 1875, it was sufficient, where jurisdiction depended upon citizenship, if it appeared from the record that the contro-

[1] Union Bank *v.* Stafford, 12 How. 327; Wood *v.* Davies, 18 *id.* 467; Ward *v.* Arredondo, 1 Paine 410.

[2] Horn *v.* Lockhart, 16 Wall. 570. See also Vattier *v.* Hinde, 7 Pet. 252; Mollan *v.* Torrance, 9 Wh. 537; Cameron *v.* McRoberts, 3 *id.* 591; Connolly *v.* Taylor, 2 Pet. 556; Hicklin *v.* Marco, 56 Fed. Rep. 549; Claiborne *v.* Waddell, 50 *id.* 368.

[3] McCormic *v.* Sullivant, 10 Wh. 192; De Wolf *v.* Rabaud, 1 Pet. 476; *Ex parte* Smith, 94 U. S. 455; Hornthall *v.* The Collector, 9 Wall. 560; Bingham *v.* Cabot, 3 Dall. 382; Gassies *v.* Ballon, 6 Pet. 761; Eberley *v.* Moore, 24 How. 157; Christmas *v.* Russell, 5 Wall. 290; Mason *v.* Rollins, 13 *id.* 602; Horne *v.* Hammond, 155 U. S. 393; Cooper *v.* Newell, *Ibid.* 532; Stuart *v.* Easton, 156 *id.* 46; Gordon *v.* Third Nat. Bk., 144 *id.* 97; Kellam *v.* Keith, *Ibid.* 568. It cannot be inferred argumentatively: Brown *v.* Keene, 8 Pet. 115. An answer denying each and every allegation of the petition puts in issue citizenship, and if no proof or finding on that point appears of record, the judgment must be reversed: Roberts *v.* Lewis, 144 U. S. 653. Where citizenship appears on the face of the bill, the jurisdiction of the court cannot be attacked by evidence *dehors* the record, in a collateral proceeding by one not a party to the bill: *In re* Lennon, 166 U. S. 548.

[4] See § 144 *infra*.

versy was between citizens of different states. And under that act the courts did not regard the position of the parties on the record, as plaintiffs or defendants, as determining the question whether the controversy was between citizens of different states, but would ascertain the real matter in dispute and arrange the parties on one side or the other of that matter, as circumstances seemed to require; and if after such arrangement it appeared that those on one side were all citizens of different states from all those on the other side, the court had jurisdiction.[1]

Circuit and district courts have such powers only as have been conferred upon them by acts of Congress not inconsistent with the Constitution of the United States.[2]

Nominal and Formal Parties.

§ 128. It is a doctrine recognized by the federal courts that the jurisdiction of the courts is not affected by merely nominal and formal parties who are without the requisite citizenship, if the real matter in controversy is between parties having a proper citizenship.[3] And if it appears that the real controversy is between citizens of different states, or an alien and a citizen, and the plaintiff is by some positive rule of law compelled to use the name of another to perform merely a ministerial act who has not, nor ever had, any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists.[4]

Evidences of Citizenship; Persons of African Descent.

§ 129. A person who resides within a state and has carried on

[1] The Pacific Railroad *v.* Ketchum, 101 U. S. 289. See also § 124 *supra*.

[2] United States *v.* Eckford, 6 Wall. 484; Seldon *v.* Still, 8 How. 441; United States *v.* Clark, 8 Pet. 444; Briscoe *v.* Bank, 11 *id.* 257; Harrison *v.* Hadley, 2 Dill. 229; United States *v.* Hudson, 7 Cr. 52. And they must of their own motion look into and determine their jurisdiction: Mansfield, C. and L. M. R. Co. *v.* Swan, 111 U. S. 379; Parker *v.* Ormsby, 141 *id.* 81.

[3] Browne *v.* Strode, 5 Cr. 303; Wormley *v.* Wormley, 8 Wh. 421; McNutt *v.* Bland, 2 How. 1; Coal Co. *v.* Blatchford, 11 Wall. 172; Arapahoe County *v.* Kansas Pacific R. Co., 4 Dill. 277; Hervey *v.* Illinois Mid. R. Co., 7 Biss. 103; Wood *v.* Davis, 18 How. 467; Union Bank *v.* Stafford, 12 *id.* 327. The jurisdiction of a suit brought by a next friend depends on the citizenship of the infant: Voss *v.* Neineber, 68 Fed. Rep. 947.

[4] See *ante*, § 126; Walden *v.* Skinner, 101 U. S. 577.

business within the same for a considerable length of time would be presumed to be a citizen of the same, in the absence of evidence to the contrary. In case of a recent removal of a person from one state to another, citizenship may depend upon the circumstances and the intentions of the parties. The exercise of the right of suffrage would ordinarily be quite conclusive of the latter; and if a party acquires the right of suffrage in a state to which he has removed, accompanied by acts and conduct indicating a permanent location, this may be quite satisfactory evidence of citizenship.[1] But it was held, during the time that slavery existed in this country, that a free negro of African descent, whose ancestors were brought to this country and sold as slaves, could not become a citizen.[2]

Executors and Administrators.

§ 130. If executors or administrators are personally qualified by their citizenship to bring suit in the circuit courts, the jurisdiction will not be defeated by the fact that the parties whom they represent would be disqualified from bringing suit on account of their citizenship.[3] So the jurisdiction of the circuit court cannot be defeated by the fact that with the principal defendant are joined, as nominal parties, the executors of a deceased trustee who are citizens of the same state as the complainant, where the bill only requires of them the ministerial act of conveying title to the lands in controversy, if the power so to do is vested in them by the laws of the state where the suit is brought.[4] So an administrator who is a resident of one state may sue a citizen of another state in the circuit court of the state where he resides, although letters of administration were granted in the latter state.[5] So if a receiver of a corporation is a citizen of a state other than that of the defendant, he may sue in this

[1] Shelton *v.* Tiffin, 6 How. 163.

[2] Dred Scott *v.* Sanford, 19 How. 393.

[3] Coal Co. *v.* Blatchford, 11 Wall. 172. And see Bangs *v.* Loveridge, 60 Fed. Rep. 963.

[4] Walden *v.* Skinner, 101 U. S. 577.

[5] Rice *v.* Houston, 13 Wall. 66. See also Walker *v.* Beal, 3 Cliff. 155; Weed Sew. M. Co. *v.* Weeks, 3 Dill. 261. An action against a non-resident administrator is sustainable though the state laws give exclusive jurisdiction to the probate court: Semmes *v.* Whitney, 50 Fed. Rep. 666. The pendency of administration proceedings in the state probate court does not bar proceedings in the federal courts involving the same issues: Holton *v.* Guinn, 76 *id.* 96.

court in the state where the latter resides, although the corporation is a citizen of the same state with the defendant.[1]

Parties Having Only Equitable Interests.

§ 131. The circuit court, in determining its jurisdiction, based upon the proper residence of parties, will not, in suits at law, always inquire into the residence of those who may have a mere equitable interest in the matter in controversy.[2] But trustees cannot maintain a bill to foreclose a trust deed or mortgage, where one of them is a citizen of the same state with the defendant, although the *cestui que trusts* are citizens of another state.[3]

Where Citizenship in Equity not Important.

§ 132. In proceedings in equity the citizenship of the parties is not always important in determining the jurisdiction of the court. Thus where a bill was filed in the circuit court to stay proceedings at law in the same court, the equity suit was held to be auxiliary to the action at law, and maintainable without regard to the citizenship or alienage of either party to the record. But the complainant in such a case cannot maintain the suit for any other relief or for any other purpose, without showing the proper residence of the parties, as required by the statute.[4]

Where a bill was filed in order to procure a construction of orders, decrees and acts done or made by the court in which it was filed, it was held proper, although the parties interested in

[1] Farlow *v.* Lea, C. L. B. 329.

[2] Bonnafee *v.* Williams, 3 How. 574; Smith *v.* Kernochen, 7 *id.* 198.

[3] Coal Co. *v.* Blatchford, 11 Wall. 172. See also Hotel Co. *v.* Wade, 97 U. S. 13; Dodge *v.* Tulleys, 144 *id.* 451; Morris *v.* Lindauer, 54 Fed. Rep. 23. But see Browne *v.* Browne, 1 Wash. 429. The appointment of one as a trustee by a court of another state does not affect his citizenship: Shirk *v.* La Fayette, 52 Fed. Rep. 857.

[4] St. Luke's Hospital *v.* Barclay, 3 Blatch. 359; Simms *v.* Guthrie, 9 Cr. 19; Dunn *v.* Clark, 8 Pet. 3; Covell *v.* Heyman, 111 U. S. 176. In Johnson *v.* Christian, 125 *id.* 642, the Supreme Court by oversight reversed a case in equity because the citizenship was not shown, but as it was a suit to enjoin a judgment at law between the same parties, a rehearing was granted and the case was affirmed on its merits in 128 U. S. 374. If citizenship of the parties gives the circuit court jurisdiction a party having a legal right to maintain an action at law will not be defeated for the want of proper citizenship of persons who have mere equitable interests: Bonnafee *v.* Williams, 3 How. 574.

having the construction made would not, for want of proper citizenship, be entitled to proceed by an original bill of any kind in such court.[1] So, where a party had obtained judgment at law in the circuit court of the state of Michigan against a citizen of that state, he at the time being a resident of the state of New York, and afterwards, having moved to the state of Michigan, where the defendant still resided, filed a bill of discovery in aid of execution in the same court where the original judgment was obtained, to which there was a demurrer for want of jurisdiction, the court held that the change of residence of the plaintiff to the state of Michigan, after the commencement of the original suit, did not oust the court of jurisdiction in this auxiliary proceeding.[2] But in such a case it should appear from the averments of the bill that the matter has already been litigated in the same court by the same persons, and is in addition and auxiliary or ancillary to such original suit; otherwise the circuit court would have no jurisdiction.[3] If the bill is not an original one, but a bill of revivor filed on the death of the original complainant, this court has jurisdiction of the suit, if it had original jurisdiction, even though the complainant in the last proceeding may be a resident of the same state as the defendant.[4]

If a bill be filed to set aside a judgment of the court on the ground of fraud, the court has jurisdiction, although both parties

[1] Minnesota Co. *v.* St. Paul Co., 2 Wall. 609.

[2] Hatch *v.* Dorr, 4 McLean 112. See also Reilly *v.* Golding, 10 Wall. 56; Clarke *v.* Mathewson, 12 Pet. 164.

[3] Christmas *v.* Russell, 5 Wall. 290. And, in general, where the proceeding is merely auxiliary to a former suit, the citizenship and amount in controversy are immaterial: Lamb *v.* Ewing, 54 Fed. Rep. 269; Carey *v.* Houston and T. C. R. Co., 161 U. S. 115; Megibben *v.* Perin, 49 Fed. Rep. 183; 53 *id.* 86; Bausman *v.* Denny, 73 *id.* 69; Henderson *v.* Goode, 49 *id.* 887; Carpenter *v.* North. Pac. R. Co., 75 *id.* 850; Pullman's Palace Car Co. *v.* Washburn, 66 *id.* 790. Where the court acquires jurisdiction of property and retains it for purposes of foreclosure, it may dispose of all claims between intervenors without regard to citizenship: Park *v.* New York, L. E. and W. R. Co., 70 Fed. Rep. 641. And see Compton *v.* Jesup, 68 *id.* 263. Otherwise, where the property is not drawn into the court's possession: United Elec. Securities Co. *v.* La. Elec. Light Co., *Ibid.* 673.

[4] Dunn *v.* Clarke, 8 Pet. 1; Morgan *v.* Morgan, 2 Wh. 290; Mollan *v.* Torrance, 9 *id.* 537; Jones *v.* Andrews, 10 Wall. 337; Logan *v.* Patrick, 5 Cr. 288; Simms *v.* Guthrie, 9 *id.* 19.

thereto are citizens of the same state.[1] And where the interest of parties becomes complicated by protracted litigation, and it is necessary to prevent a failure of justice, the circuit court will take cognizance of a bill for the purpose of settling the rights and protecting the interests of the parties, without regard to the citizenship of the parties. But the jurisdiction in such cases would rest upon the ground that they were merely auxiliary to former suits.[2]

When Parties May be Dismissed.

§ 133. If the court has no jurisdiction over parties to a suit for want of proper citizenship, and they are not indispensable, and a decree can be rendered as to the other parties without prejudice to them, they may be dismissed, and the court proceed to determine the cause between the remaining parties.[3] Nor will the court inquire into the residence of those who have a mere equitable interest in the subject in controversy, where the plaintiff has a legal right to sue, and where, so far as the legal right is concerned, the parties to the controversy have the requisite citizenship.[4]

Corporations are Citizens.

§ 134. In the construction of the Constitution and of acts of Congress conferring jurisdiction on the federal courts on the ground of the citizenship of the parties, corporations have come to be regarded as citizens within the meaning of the law; it being conclusively presumed that the members of the corporations are residents of the state creating them, or under whose

[1] O'Brien Co. *v.* Brown, 1 Dill. 588; Simms *v.* Guthrie, 9 Cr. 19. See also Osborne *v.* Mich. Air L. R. Co., 11 C. L. N. 367. A circuit court has jurisdiction of a proceeding to impeach its own former decree though the parties are new and aliens: Lacassagne *v.* Chapins, 144 U. S. 119.

[2] Cornwell *v.* White Water, etc., R. Co., 4 Biss. 195; Barth *v.* McKeever, 4 *id.* 206; Freeman *v.* Howe, 24 How. 450; Minnesota R. Co. *v.* St. Paul R. Co., 2 Wall. 609. But see also Dunn *v.* Clarke, 8 Pet. 1; Stone *v.* Bishop, 4 Cliff. 593.

[3] Horn *v.* Lockhart, 17 Wall. 570; Mollan *v.* Torrance, 9 Wh. 537; Connolly *v.* Taylor, 2 Pet. 556; Vattier *v.* Hinde, 7 *id.* 252. And see Knapp *v.* Railroad Co., 20 Wall. 117. Resident defendants cannot move to dismiss as to themselves; non-residents can move to dismiss only as to themselves, not as to the whole proceeding: Smith *v.* Atchison T. & S. F. R. Co., 64 Fed. Rep. 1.

[4] Bonnafee *v.* Williams, 3 How. 574; Smith *v.* Kernochen, 7 *id.* 198.

laws they were organized. And a suit brought by a citizen of one state against a corporation in the circuit court of the state where it was created or organized, other than that of the residence of the plaintiff, is a suit between citizens of different states, notwithstanding members or stockholders of the corporation may reside in the same state with the plaintiff.[1] But a corporation created by one state cannot be sued as a citizen of another, on the ground that it has a usual place of business in the latter state.[2] Under the act of 1888 the courts have jurisdiction of an action against a foreign corporation brought in the district where the plaintiff resides, when such corporation is subjected to the jurisdiction of the state courts.[3]

If railroad corporations created by or under the laws of different states are consolidated, and the railroad is operated by virtue of that consolidation as one continuous entire line of road, the corporation thus consolidated may be treated for the purpose of jurisdiction as a citizen of either state; and if a corporation is created under the laws of two states, a citizen of one of these states may, so far as citizenship is concerned, sue it in the other.[4]

[1] Ohio & Miss. R. R. Co. *v.* Wheeler, 1 Black. 296; Louisville R. R. Co. *v.* Letson, 1 How. 497; Marshal *v.* Baltimore, etc., R. R. Co., 16 *id.* 314; Covington, etc., Co. *v.* Shepherd, 21 *id.* 212; Railroad *v.* Harris, 12 Wall. 65; Railroad Co. *v.* Whitton, 13 *id.* 270; St. Louis & S. F. R. Co. *v.* James, 161 U. S. 545. But the organization of a corporation in another state for the express purpose of bringing suit in a federal court will not confer jurisdiction: Lehigh Min. & Manufg. Co. *v.* Kelly, 160 U. S. 327. A co-partnership is not a corporation; the citizenship of the partners must be averred: Carnegie, Phipps & Co. *v.* Hulbert, 10 U. S. App. 454.

[2] Shaw *v.* Quincy Mining Co., 145 U. S. 444; Empire Coal & Transp'n Co. *v.* Empire Coal & Mining Co., 150 *id.* 159; Campbell *v.* Duluth, 50 Fed. Rep. 241; Miller *v.* Wheeler & Wilson Manufg. Co., 46 *id.* 882; South Pac. Co. *v.* Denton, 146 U. S. 202; *cf.* Fitzgerald & M. Constru. Co. *v.* Fitzgerald, 137 *id.* 98; Société Foncière *v.* Milliken, 135 *id.* 304; E. Tenn., V. & G. R. Co. *v.* Atlanta & F. R. Co., 49 Fed. Rep. 608; U. S. *v.* South Pac. R. Co., 49 *id.* 297. And a corporation chartered by one state and authorized by statute in another to extend its road there is a "non-resident" of the latter state and may remove a suit to the circuit court: Martin *v.* Balt. & O. R. Co., 151 U. S. 673.

[3] Dinzy *v.* Ill. Cent. R. Co., 61 Fed. Rep. 49. And see Shainwald *v.* Davids, 69 *id.* 704; Gilbert *v.* New Zealand Ins. Co., 49 *id.* 884.

[4] Railway Co. *v.* Whitton, 13 Wall. 270; Muller *v.* Dows, 94 U. S. 444; St. Louis, etc., R. R. Co. *v.* Ind. & St. Louis R. R. Co., 12 C. L. A. 73; Phinizy *v.* Augusta & K. R. Co., 56

Burden of Proof of Citizenship of Corporations.

§ 135. Where a suit was brought against a corporation in a state court which was removed by the corporation to a circuit court of the United States on the ground that it was a controversy between citizens of different states, on motion of plaintiff to remand the cause it was held that the burden of proof was on the corporation to show that it was not a citizen of the same state with the plaintiff, and that it was generally incumbent upon the suitors who invoke the jurisdiction of the courts of the United States to show that they are within its jurisdiction.[1]

If a corporation has appeared generally in an action, it cannot afterwards deny the jurisdiction of the court on the ground that original process was not duly served upon it in the district of which it was an inhabitant at the time of service.[2] Nor can a circuit court be ousted of jurisdiction by a stipulation of a foreign corporation that process issued in any suit brought against said corporation may be served upon any of its agents with like effect as if service had been made on the company within the state.[3]

When the United States are Plaintiffs.

§ 136. When the United States are plaintiffs or petitioners, the circuit court has jurisdiction, irrespective of the amount in controversy.[4]

It has been held that an act of Congress was not necessary to enable the United States to sue; that they have an inherent right to sue in their own name, unless a different mode is prescribed by

Fed. Rep. 273; Mo. Pac. R. Co. *v.* Meeh, 69 *id.* 753. In such case the citizen of a state other than either of the states under whose laws the corporation was created may sue it in the circuit court for either, where the directors generally meet to transact business: Culbertson *v.* Wabash N. Co., 4 McLean 544. A railway company is not a citizen in every state it passes through: St. Joseph & G. I. R. Co. *v.* Steele, 167 U. S. 659.

[1] Copeland *v.* The Memphis & Charleston R. Co., 3 Woods. (C. C.) 651. For, in general, the necessary facts must be shown to authorize removal. See Ins. Co. *v.* Pechner, 95 U. S. 183; Amory *v.* Amory, *Ibid.* 186.

[2] Kelsey *v.* Pennsylvania R. R. Co., 14 Blatch. 89. See also Gracie *v.* Palmer, 8 Wh. 699; Pollard *v.* Pickett, 4 Cr. 421.

[3] *Ex parte* Schollenberger, 96 U. S. 369.

[4] Rev. Stat. § 629, sub. 2 and 3, act of March 3, 1875, § 1. See § 122 *supra*.

statute;[1] and that if they sue on commercial paper they have all the rights and are subject to all the responsibilities of individuals who are parties to such instruments.[2] So in relation to the proprietorship of real or personal property, the United States have the same rights and remedies, and are subject to similar liabilities in managing and dealing with it through their agents as natural persons.[3] So the United States courts have jurisdiction in case of suits on bonds of the agents or officers of the United States, given in pursuance of the statutes of the United States.[4] And where a bond was given by a postmaster to the Postmaster-General of the United States, it was held that the Postmaster-General could maintain an action in his own name in the circuit court of the United States on the bond.[5]

Where Citizens of the Same State Claim Lands under Grants of Different States.

§ 137. The circuit courts may take cognizance of cases where the parties to a controversy are citizens of the same state, provided they claim lands under grants from different states. The Constitution contained this provision, as well as the act of 1789, under which it was held that the circuit court in Vermont had jurisdiction where both parties were residents of that state, and one party claimed land under a grant from the state of New Hampshire, and the other under a grant from the state of Vermont, although, at the time of the first grant, Vermont was a part of the state of New Hampshire.[6] So it was held that the jurisdiction of a circuit court extended to a controversy between citizens of Kentucky claiming lands under different grants,—one under a grant from the state of Kentucky,—but upon warrants issued by the state of Virginia, and locations founded thereon prior to the

[1] United States *v.* Baker, 1 Paine 156. See also United States *v.* Baker, 12 Wh. 589.

[2] United States *v.* Bank of the Metropolis, 15 Pet. 377; United States *v.* Dunn, 6 *id.* 51; The Floyd Acceptances, 7 Wall. 666.

[3] Neilson *v.* Lagow, 12 How. 98; United States *v.* Tingey, 5 Pet. 115; United States *v.* Bradley, 10 *id.* 343; United States *v.* Hage, 6 How. 279; s. c., 13 *id.* 478.

[4] Smith *v.* United States, 5 Pet. 293; Farrar *v.* United States, *Ibid.* 373; U. S. *v.* Belknap, 73 Fed. Rep. 19.

[5] Postmaster-General *v.* Early, 12 Wh. 136.

[6] The Town of Panlet *v.* Clark, 9 Cr. 292 (1815); Act of March 3, 1875, ch. 137, § 1, 18 Stat. L. 470.

separation of Kentucky from Virginia, and the other based upon a grant from the state of Virginia. The court in this case, in construing the Constitution and the act of Congress, held that it was the grant that gave the title and jurisdiction.[1]

Controversy Between Citizens of a State and Foreign States, Citizens or Subjects.

§ 138. Under the provisions of the statute, which is also the language of the Constitution on the same subject, it has been decided that where both the plaintiff and defendant were aliens, a federal court would have no jurisdiction.[2] The provisions of the act of 1888, conferring powers upon the circuit courts, follow the language of the Constitution. And by the statute, if by reason of the proper citizenship of the parties a suit may be brought originally in a circuit court, for the same reason a cause originally commenced in a state court may be removed to the circuit court.[3] But we shall hereafter consider the subject of the removal of causes from the state courts to the circuit courts of the United States.

In case of the alienage of one party, the other party must be a citizen in order to confer jurisdiction on the ground of proper citizenship; and these facts, as well as all other jurisdictional facts, should be averred in the pleadings.[4] Where the alienage of one party is the ground of jurisdiction, it should be not only so averred, but also that he is a citizen or subject of some one foreign state.[5] But an alien legatee or executor may sue an executor who is a citizen of the state where the suit is brought,

[1] Colson *v.* Lewis, 2 Wh. 377. See also the Bank of the U. S. *v.* Devereux, 5 Cr. 61 (1809). As to the amount in dispute, see § 122, *supra*, 174, *infra*, and notes.

[2] Montalet *v.* Murray, 4 Cr. 46; Mossman *v.* Higginson, 4 Dall. 12; Piquignot *v.* The Pennsylvania R. Co., 16 How. 104; Hinckley *v.* Byrne, 1 Deady 224.

[3] Act of 1888, § 1.

[4] Montalet *v.* Murray, 4 Cr. 46; Prentiss *v.* Brennan, 2 Blatch. (C. C.) 162; Rateau *v.* Bernard, 3 Blatch. 244; Daniel *v.* Twentyman, 2 Pet. 146.

[5] Wilson *v.* City Bank, 3 Sum. 422; Breithaupt *v.* Bank, 1 Pet. 238. See also Breadlove *v.* Nicolet, 7 Pet. 413; Jones *v.* McMasters, 20 How. 8; Weems *v.* George, 13 *id.* 190; Bonaparte *v.* Camden and A. R. Co., 1 Bald. (C. C.) 205; United States *v.* Hall, 98 U. S. 343. The mere fact of residence in a foreign country with the intention of becoming a citizen does not show alienage: Bishop *v.* Averill, 76 Fed Rep. 386.

although the testators whom they represent were both citizens of the same state.[1]

Exclusive Cognizance of Crimes.

§ 139. The first section of the act of August 13, 1888, provides that the circuit courts "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offences cognizable by them."

The criminal jurisdiction of the circuit court is expressly conferred by this provision, which is the language of the Judiciary Act of 1789,[2] and of the Revised Statutes on the same subject.[3]

The federal courts have no jurisdiction in criminal cases, except such as is expressly conferred upon them by the Constitution and the acts of Congress, and they can try no offences except such as are permitted by said Constitution and acts.[4] They have, strictly speaking, no common law jurisdiction.[5]

The jurisdiction of the circuit courts is expressly made concurrent with the district courts of crimes and offences cognizable therein. It is important, therefore, to understand the facts and circumstances under which the district court may exercise jurisdiction in such cases.

The statute provides, in reference to the criminal jurisdiction of the district courts, as we have already seen, that they shall have jurisdiction "of all crimes and offences cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of

[1] Chappedelaine *v.* Dechenaux, 4 Cr. 306.

[2] Judiciary Act of 1789, sec. 2, 1 Stat. L. 78.

[3] Rev. Stat. § 629, sub. 20.

[4] United States *v.* Barney, 5 Blatch. 294 (1866).

[5] *Ex parte* Bollman, 4 Cr. 75; United States *v.* Hudson, 7 *id.* 32; United States *v.* Coolidge, 1 Wh. 415; United States *v.* Wilson, 3 Blatch. 435; United States *v.* Lancaster, 2 McLean 431; United States *v.* Irwin, 5 *id.* 178; United States *v.* Worrell, 2 Dall. 384; United States *v.* Reese, 4 Saw. 629. But they are governed by common-law rules in their criminal administration: Howard *v.* U. S., 75 Fed. Rep. 986. See also § 35 *supra*. There is no jurisdiction where one Indian commits a crime on another in Indian Territory: Smith *v.* U. S., 151 U. S. 50. See also *In re* Mayfield, 141 *id.* 107.

which shall not be capital, except in the cases mentioned in section 5412, title Crimes." [1]

The state courts have no jurisdiction of offences committed against the laws of the United States, and no part of the judicial power of the United States can consistently be delegated to the state courts.

It sometimes occurs that the same act is a transgression, not only of a law of the United States, but of a statute of a state. Thus it may be an offence under a state law to pass counterfeit coin, although the same act is an offence under an act of Congress. In such a case a conviction and punishment under the state law is no bar to a prosecution under the act of Congress.[2] So where an assault upon a marshal, or a hindering of him in the execution of process, is an offence against the laws of the United States, as well as of the state where the offence is committed, he may be tried and convicted by both, and a conviction by either would be no bar to a prosecution and conviction by the other.[3]

Cognizance of Crimes where the Punishment is Death.

§ 140. We have observed that the circuit court has exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where it is otherwise provided by law, and concurrent jurisdiction with the district court of all offences cognizable therein. As the district courts have jurisdiction of all crimes and offences cognizable under the authority of the United States committed in their respective districts, or upon the high seas, "the punishment of which is not capital," etc., it follows that the circuit courts have cognizance of all capital offences, except where otherwise provided by law. The exception embraces those cases that, under the provisions of the statute, are triable by a general court-martial for offences

[1] Rev. Stat. § 563, sub 1.

[2] Fox *v.* Ohio, 5 How. 410; Prigg *v.* Pennsylvania, 16 Pet. 540; City of New York *v.* Miln, 11 *id.* 142; Barron *v.* Baltimore 7 *id.* 243; Huston *v.* Moore, 5 Wh. 1; White *v.* Commonwealth, 4 Bin. 418; Stearns *v.* United States, 2 Paine (C. C.) 300; United States *v.* Holliday, 3 Wall. 407.

[3] Moore *v.* The State of Illinois, 14 How. 13. See also The United States *v.* Bevans, 3 Wh. 336; *Ex parte* Siebold, 100 U. S. 371; U. S. *v.* Patrick, 54 Fed. Rep. 338.

committed by a person while in the service of the army or navy of the United States.[1]

There are, however, several offences under the statutes of the United States punishable by death, of which the circuit courts of the United States have exclusive cognizance. These offences embrace piracy upon the high seas,[2] and accessories thereto;[3] treason;[4] and murder in certain places within the territorial or maritime jurisdiction of the United States.

Section 5339 of the Revised Statutes provides: Every person who commits murder—

First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;[5]

Second. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state; or upon the waters of any of the Great Lakes;[6]

Third. Or who, upon any such waters, maliciously strikes, stabs, wounds, poisons or shoots at any other person, of which striking, stabbing, wounding, poisoning or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death.[7]

[1] Rev. Stat. § 1342, art. 58; § 1624, art. 4. As to criminal jurisdiction of the circuit courts, see further, United States *v.* Holliday, 3 Wall. 407; Same *v.* Donlan, 5 Blatch. 284.

[2] Rev. Stat. § 5323.

[3] *Ibid.* § 5324.

[4] *Ibid.* § 5331.

[5] See *In re* Kelly 71 Fed. Rep. 545; U. S. *v.* Penn., 48 *id.* 669.

[6] Namely, Lake Superior, Lake Michigan, Lake Huron, Lake Saint Clair, Lake Erie, Lake Ontario, or any of the waters connecting any of the said lakes; Act of Sept. 4, 1890, ch. 874, 26 Stat. L. 424, 1 Supp. R. S. 799. And see U. S. *v.* Rodgers, 150 U. S. 249.

[7] Rev. Stat. § 5339; The United States *v.* Bevans, 3 Wh. 336. For further construction of the language of this act, see U. S. *v.* McGill, 4 Dall. 426; U. S. *v.* Furlong, 5 Wh. 184; U. S. *v.* Holmes, *Ibid.* 412; U. S. *v.* Marchant, 12 *id.* 480; U. S. *v.* Douglass, 2 Blatch. 207; U. S. *v.* Magill, 1 Wash. 463; U. S. *v.* Ross, 1 Gallis. 624; U. S. *v.* Cornell, 2 Mas. 91; U. S. *v.* Ferman, 4 Mas. 505. Unless exempted by treaty, a foreign vessel entering a United States port for trade is subject to local law and the local courts may punish for crimes committed on the vessel within the port by one foreigner on another: Wildenhus's Case, 120 U. S. 1.

Capital Cases Remitted from the District to Circuit Courts.

§ 141. As capital offences cannot be tried by the district courts, it is provided by statute that "every indictment of a capital offence presented to a district court, together with the cognizances taken therein, shall, by order entered on the minutes, be remitted to the next session of the circuit court for the same district; and on the filing of such order and indictment with the clerk of such circuit court, that court shall proceed thereon in the same manner as if said indictment had been originally found and presented therein."[1]

It is obvious that cases must occur where there may be some uncertainty as to the character of the offence, as whether it is capital or otherwise; and where it is developed before a grand jury of the district court that it is a capital one, the provision of the foregoing section, which authorizes the finding and presenting of an indictment therefor to the district court, and the remittal of the same to the circuit court of the same district, is manifestly wise and beneficent.

Offences on the High Seas, Where Triable.

§ 142. The trial of offences committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district must be in the district where the offender is found or into which he is first brought.[2]

The foregoing provision of the Revised Statutes last cited is a substantial re-enactment of former acts of Congress, under which it has been held that in order to confer jurisdiction upon a federal court in such cases it must appear, not only that the accused was first apprehended in or first brought into the district where the trial is had, but that the offence was committed out of the jurisdiction of any state, and not within any other district of the United States. This is a matter for the jury to determine. And where they merely found that the offence was committed at a certain place designated in the indictment, but omitted to

[1] Rev. Stat. § 1039. We shall hereafter consider the power to remit in other cases, not only from the district to the circuit courts, but also from the circuit to the district courts: Rev. Stat. §§ 1037, 1038.

[2] Rev. Stat. § 730.

find that this place was outside the limits of any state, the verdict was set aside.[1]

Offences in Other Cases, Where Triable.

§ 143. It is further provided by statute that, in other cases, "the trial of offences punishable with death shall be had in the county where the offence was committed, where that can be done without great inconvenience;"[2] and that, "when any offence against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed there."[3] The latter provision, it is manifest, applies as well to the district as to the circuit courts of the United States. The statutory provisions referred to clearly point out the particular forum that has cognizance of offences against the laws of the United States, whether capital or otherwise.

Where a Civil Suit must be Brought.

§ 144. "No civil suit shall be brought before either a circuit or district court, against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."[4] The service should be personal.

[1] United States *v.* Jackalow, 1 Black. 484. See also United States *v.* Arwo, 19 Wall. 486; United States *v.* Baker, 5 Blatch. 6. See also ch. xxi., note to § 730 of Rev. Stat.

[2] Rev. Stat. § 729.

[3] Rev. Stat. § 731. "No person shall be arrested in one district for trial in another in any civil action before a circuit or district court:" Act of Aug. 13, 1888, § 1. See Cook *v.* U. S., 138 U. S. 157, as to the jurisdiction over No Man's Land, the place of trial, etc.

[4] Act of Aug. 13, 1888, § 1. This is a privilege of the defendant, and where it is waived the court has jurisdiction: Centr. Trust Co. *v.* McGeorge, 151 U. S. 129, reversing 55 Fed. Rep. 769; Interior Constr. & Imp. Co *v.* Gibney, 160 U. S. 217; South. Expr. Co. *v.* Todd, 56 Fed. Rep. 104. See as to the meaning of "inhabitant" or "resident," Galveston, H. & S. A. R. Co. *v.* Gonzales, 151 U. S. 496; *In re* Keasbey and Mattison Co., 160 *id.* 221; Marks *v.* Marks, 75 Fed. Rep. 321. The state laws cannot restrict the plaintiff's right to choose the district: E. Tenn.,

The want of proper service may, however, be waived by entering an appearance to the suit.[1] It was formerly not necessary to aver on the record that the defendant was an inhabitant of the district, and when he appeared without objection it was an admission of the regularity of service.[2] These provisions are inapplicable to aliens or foreign corporations; they may be sued in any district where service can be obtained.[3] And they are applicable only to cases commenced in a federal court, not to cases removed there.[4] They do not apply to cases in admiralty.[5]

By the act of March 3, 1897, it is provided "that in suits brought for the infringement of letters-patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant,

V. & G. R. Co. *v.* Atlanta & F. R. Co., 49 Fed. Rep. 608. Where the action is brought in a district of which one of two plaintiffs is the only resident party, there is no jurisdiction on the ground of diverse citizenship: Smith *v.* Lyon, 133 U. S. 315. And see Excelsior Pebble Phosphate Co. *v.* Brown, 74 Fed. Rep. 321. An alien can sue only in the district in which the defendant citizen resides: Campbell *v.* Duluth, S. S. & A. R. Co., 50 *id.* 241.

[1] Levy *v.* Fitzpatrick, 15 Pet. 167; Toland *v.* Sprague, 12 *id.* 300; Harrison *v.* Rowan, 1 Pet. (C. C.) 489. Service according to the state laws is sufficient: Jewett *v.* Garrett, 47 Fed. Rep. 625.

[2] Gracie *v.* Palmer, 8 Wh. 605; Pollard *v.* Pickett, 4 Cr. 421. But see § 153 *infra*.

[3] *In re* Hohorst, 150 U. S. 653, a patent suit brought against an alien. This case has been held to decide that where exclusive jurisdiction is in the federal courts, as in patent cases, suit need not be brought in the district where the defendant resides: Van Patten *v.* Chic., M. & St. P. R. Co., 74 Fed. Rep. 981; Smith *v.* Sargent Manufg Co., 67 *id.* 801; Noonan *v.* Chester Park A. C. Co., 75 *id.* 334. And see the opinion in *In re* Keasbey and Mattison Co., 160 U. S. 221. On the other hand, the decision in the above case has been held to be limited to the case of aliens, and suits to restrain the infringement of patents have not been allowed to be brought outside of the district of the defendant's residence: Union Switch & Signal Co. *v.* Hall Signal Co., 65 Fed. Rep. 625; Donnelly *v.* U. S. Cordage Co., 66 *id.* 613; Gorham Manufg Co. *v.* Watson, 74 *id.* 418; Cramer *v.* Singer Manufg, Co., 59 *id.* 74; Anderson *v.* Germain, 48 *id.* 295. See the act of March 3, 1897, *infra*.

[4] Richmond *v.* Brookings, 48 Fed. Rep. 241; Balt. & O. R. Co. *v.* Meyers, 18 U. S. App. 569.

[5] *In re* Louisville Underwriters, 134 U. S, 488.

but in which such defendant has a regular and established place of business, service of process, summons or subpœna upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."[1]

Attachment of Property will not Confer Jurisdiction.

§ 145. If the defendant is not an inhabitant of the district where the suit is brought, jurisdiction cannot be acquired by means of an attachment of his property within the district under the statutes of the state.[2] Nor under the act of 1875 could the process of foreign attachment be properly issued where the defendant was domiciled abroad, though a citizen of the United States, if he were not duly served with original process within the district.[3] Nor could a party be said to be found within the district, or properly served there, who had been inveigled into it for the purpose of making service there, by the false representations or deceitful contrivances of the plaintiff, or who was there merely to attend the trial of a case to which he was a party, or to plead to an indictment against him.[4]

Where Service may be had by Publication.

§ 146. Section 8 of the act of March 3, 1875, provides: "That when in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property found within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to

[1] Act of March 3, 1897, ch. 395, 29 Stat. L. 695, 2 Supp. R. S. 615.

[2] Day *v.* Newark Man. Co., 1 Blatch. 628; Caffee *v.* Hayward, 20 How. 208; Pennoyer *v.* Neff, 95 U. S. 714; *Ex parte* Railway Company, 103 *id.* 794. In this case the court held that a judgment of the circuit court relating to its jurisdiction would not be reviewed upon a petition for a mandamus.

[3] Toland *v.* Sprague, 12 Pet. 300; Mauldin *v.* Carrol, 3 Hughes 24; Picquet *v.* Swan, 5 Mason 35; Sadler *v.* Hudson, 2 Curt. 6.

[4] Union Sugar Refinery *v.* Mathieson, 2 Cliff. 304; Parker *v.* Hotchkiss, 1 Wall, Jr., 267; Smith *v.* Little, 5 Biss. 159; Steiger *v.* Bonn, 4 Fed. Rep. 17; s. c., 13 C. L. N. 60; Juneau Bank *v.* McSpedden, 5 Biss. 64; U. S. *v.* Bridgman, 8 A. L. Rec. 541.

make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six successive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and to proceed to a hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants, without appearance, affect only the property which shall have been the subject of the suit, and under the jurisdiction of the court therein within said district. And where a part of said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state; *provided, however*, that any defendant or defendants not actually personally notified, as above provided, may at any time within one year after any final judgment in any suit mentioned in this section enter his appearance in said suit in said circuit court; and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment, according to law."[1]

Under section 738 of the Revised Statutes where there is jurisdiction over a specific fund, defendants who are not inhabitants or residents may be cited to appear and have their rights adjudicated.[2] This is not altered by the act of 1888.[3] Where a suit

[1] 18 Stat. L., ch. 137, § 8.

[2] Goodman *v.* Niblack, 102 U. S. 556; Single *v.* Scott Paper Manufg. Co., 55 Fed. Rep. 553.

[3] Greeley *v.* Lowe, 155 U. S. 58, where it is held that in suits of the class mentioned in section 8 of the act of 1875 *supra*, the circuit court of

was brought by a citizen of Louisiana, in the circuit court of the United States for the district of Arkansas, to enforce a lien on lands situated within that district, and one of the defendants, a citizen of the state of Tennessee, was served with process in the state of Arkansas, it was held that such service gave the court jurisdiction of his person and of the subject matter; and that where it acquires such jurisdiction it will retain it for all purposes within the general scope of the equities sought to be enforced.[1]

Where all of the Defendants cannot be Served in Other Cases.

§ 147. In other cases where personal service cannot be made upon all of the defendants, section 737 of the Revised Statutes provides that the circuit court may take cognizance of suits and proceed to the trial and adjudication thereof between the parties who are properly before the court, in which case, however, the judgment or decree rendered therein will not prejudice other parties not regularly served with process or voluntarily appearing to answer. The non-joiner of parties who are not inhabitants of nor found within the district does not constitute matter of abatement or objection to the suit.[2] Under the provisions of this

the district wherein the land in dispute lies may, under the act of 1888, assume jurisdiction, though the plaintiff and some of the defendants are residents of other districts; Smith *v.* Lyon, 133 U. S. 315, is distinguished, and Goodman *v.* Niblack, *supra*, applied. And see U. S. *v.* South Pac. R. Co., 63 Fed. Rep. 481; Dick *v.* Foraker, 155 U. S. 404; Kuhn *v.* Morrison, 75 Fed. Rep. 81; McBee *v.* Marietta & N. G. R. Co., 48 *id.* 243. The above section does not ordinarily apply to specific performance, so a suit to enforce a contract to convey land must, under the act of 1888, be brought in the district where one of the parties resides: Munic. Ins. Co. *v.* Gardiner, 62 Fed. Rep. 954. But the court may consider the relief prescribed by state statutes in determining whether a suit to enforce specific performance of a contract is a suit to enforce an "equitable claim:" Single *v.* Scott Paper Manufg. Co., 55 *id.* 553. And see as to the effect of state statutes in such cases, Bardon *v.* Land & River Imp. Co., 157 U. S. 327; Prentice *v.* Duluth S. & F. Co., 58 Fed. Rep. 437; Sage *v.* Winona & St. P. R. Co., *Ibid.* 297; Gordan *v.* Jackson, 72 *id.* 86.

A circuit court may afford relief in any district where the suit is of a local nature or where the property is an entirety within several districts or subject to a lien, though the defendant is a non-resident. Rev. Stat. §§ 740–2 were not repealed by the acts of 1875 or 1888: E. Tenn., V. & G. R. Co. *v.* Atlanta & F. R. Co., 49 Fed. Rep. 608.

[1] Ober *v.* Gallagher, 93 U. S. 199.

[2] The language of the provision is as follows:

section a party residing out of the district and not served with process within it may voluntarily appear and become a party to the suit, when otherwise the court would have no jurisdiction over him.[1] So if there are several parties jointly and severally liable on a contract, as for instance in case of the endorsers of a bill of exchange, and the makers and endorsers of a joint and several promissory note, the court would have jurisdiction of those defendants properly served with process within the district, and could proceed to judgment against them, though the other parties reside without the district, and are not served within it and do not voluntarily appear.[2]

When a Party may be Omitted; When Not.

§ 148. The court will make no decree in favor of a complainant where no relief can be given without taking an account between an absent party and one before the court, though the defect of parties for this purpose may not, strictly speaking, defeat jurisdiction. But if a prior incumbrancer is out of the jurisdiction of the court, or cannot be joined without defeating it, it has been held proper for the court to dispense with his presence and order a sale subject to his incumbrance, which would not be affected by such an order or decree.[3] If parties have a merely nominal interest in the suit or proceeding as defendants, and reside beyond the jurisdiction of the court, it should not dismiss a bill because they are not made parties, but proceed to a decree against the actual defendants.[4] But where

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district as aforesaid shall not constitute matter of abatement or objection to the suit."

[1] Taylor *v* Cook, 2 McLean 516; Pond *v.* Vermont Valley R. R. Co., 12 Blatch. 282.

[2] Cooper *v.* Gordon, 4 McLean 6; Clearwater *v.* Meredith, 21 How. 489; Inbusch *v.* Farwell, 1 Black. 556.

[3] Hagan *v.* Walker, 14 How. 29; Louisville R. R. Co. *v.* Letson, 2 *id.* 497; Findlay *v.* Bank, 11 Wh. 304.

[4] Union Bk. *v.* Stafford, 12 How. 327.

the subject-matter of the action lies beyond the limits of the territorial jurisdiction of the court, and the process of the court cannot reach the *locus in quo*, the provisions of the act relating to non-resident parties do not apply.[1]

Formal Parties may be Dispensed With.

§ 149. Merely formal parties may, as we have observed, be dispensed with, and if they are made parties they may be dismissed if there can be a complete adjudication between other parties without them.[2] But if persons have such an interest in the subject-matter of the suit that a final decree cannot be made without prejudice to that interest and a defeat of their just and equitable rights, they must be made parties, and after being made parties they cannot be dismissed.[3] If, however, one defendant has a severable interest in the matter in controversy, and a decree may be rendered against the other defendants without prejudice to him, the suit may be dismissed as to him, and retained as to the others, where the court would have no jurisdiction over the former for want of proper citizenship.[4]

Suits on Contract in Favor of an Assignee.

§ 150. Section 1 of the act of August 13, 1888, provides that neither the circuit nor district courts shall "have cognizance of

[1] Northern Ind. R. R. Co. *v.* Mich. Central R. R. Co., 15 How. 233; s. c., 5 McLean 444.

Under a former act, similar to the section under consideration, it was held that no decree in equity could be made in the absence of an indispensable party whose rights must necessarily be affected by the decree. Thus where a bill was filed in the circuit court to set aside an agreement executed by six individuals, four of whom resided in the state where the suit was brought and two in another state, it was held that the court could not rescind the contract as to the two and allow it to stand as to the four: Shields *v.* Barrow, 17 How. 130. See also Mallow *v.* Hinde, 12 Wh. 193; Cameron *v.* McRoberts, 3 *id.* 591; Russell *v.* Clark, 7 Cr. 69. And the objection to the decree in such a case may be taken at the time of the hearing or in the appellate court: Coiron *v.* Millaudon, 19 How. 113; Robertson *v.* Carson, 19 Wall. 94; Kendig *v.* Dean, 97 U. S. 423.

[2] Wormly *v.* Wormley, 8 Wh. 421; Carneal *v.* Banks, 10 *id.* 181; Vattier *v.* Hinde, 7 Pet. 252; Osborn *v.* Bank, 9 Wh. 738; Harding *v.* Handy, 11 *id.* 132; New Chester Water Co. *v.* Holly Manufg. Co., 3 U. S. App. 264.

[3] Barney *v.* Baltimore City, 6 Wall. 280; Shields *v.* Barrow, 17 How. 130.

[4] Horn *v.* Lockhart, 17 Wall. 570; Batesville Institute *v.* Kauffman, 18 *id.* 151. And see Hook *v.* Payne, 14 *id.* 252; Williams *v.* Bankhead, 19 *id.* 562; Canal Bank *v.* Hudson, 111 U. S. 66.

any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action, in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation,[1] unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

This provision was undoubtedly adopted to prevent certain assignments merely for the purpose of conferring jurisdiction on the federal courts. The Judiciary Act of 1789 contained a provision very similar to that of the later act, providing that the circuit courts should not have "cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless the suit might have been prosecuted in such court to recover the contents if no assignment had been made, except in case of foreign bills of exchange."

This provision has been held to apply only to rights of action founded on contracts which contain within themselves some promise to be fulfilled or duty to be performed, and not to rights of action founded upon some wrongful act or neglect of duty to which the law attaches damages, even though based upon contract.[2] It has been held also that this provision does not apply to municipal bonds or attached coupons, where they pass from one to another merely by delivery, and without the necessity of a formal assignment.[3] Under the act of 1875 if a note were made payable to bearer he might maintain a suit on it in the circuit court if it was averred that he and the maker were residents of different states,[4] although under the earlier statute it was essential to aver that the maker was a citizen of the state

[1] See Barling *v.* British Bank of N. Amer., 7 U. S. App. 194. The act forbids suits in the circuit courts by assignees under certain circumstances "except where the chose in action is a foreign bill of exchange, or where it is founded on an obligation made by a corporation that is payable to bearer, and is negotiable by mere delivery:" Coler *v.* Grainger Co., 74 Fed. Rep. 16. And see Skinner *v.* Barr, 77 *id.* 816.

[2] Bushnell *v.* Kennedy, 9 Wall. 387.

[3] City of Lexington *v.* Butler, 14 Wall. 282; McLean *v.* Valley County, 74 Fed. Rep. 389; Thompson *v.* Searcy County, 57 *id.* 1030; Bd. Commrs. of Kearney Co. *v.* McMaster, 68 *id.* 177. See Cloud *v.* Sumas, 52 *id.* 177.

[4] The Pacific R. R. Co. *v.* Ketchum, 101 U. S. 298.

where the suit was brought and the holder a resident of another state.[1] Where the maker made the note merely for the accommodation of the payee who is, in legal effect, the maker or promisor, and, therefore, does not by indorsement assign any right of action against the accommodation maker, an action is sustainable by the indorsee against the maker, though the latter and the payee are citizens of the same state.[2] Where a suit was brought to recover damages for the failure of the defendants to take the proper steps to preserve the value of commercial paper, it was held, under the Act of 1789, that the suit was not one for the purpose of recovering the contents of a promissory note or other chose in action, and, therefore, was not within the provisions of the statute limiting the jurisdiction of the court in suits on promissory notes or other choses in action.[3] Under the provisions of the Judiciary Act of 1789, the assignee of a chose in action could sue thereon in the circuit court where the requisite citizenship of the parties existed, and the assignor might have done so if no assignment had been made, although the assignor at the time of the assignment was a citizen of the same state with the maker.[4] The same rule is applicable under the provisions of section 1 of the act of 1888.[5] Under the provisions of

[1] Strawbridge *v.* Curtiss, 3 Cr. 267; Moffat *v.* Soley, 2 Paine 103. Under the act of 1789 it was held that where there was an assignment by will, the representative of the decedent need not aver the citizenship of the maker or of the original payee of a note: Chappdeleaine *v.* Dechenaux, 4 Cr. 306. See also Seckel *v.* Backhaus, 7 Biss. 354.

[2] Holmes *v.* Goldsmith, 147 U. S. 150. An acceptance by a municipal corporation of a draft directing it to pay to the order of the payee a sum of money due to the drawer for work and labor done and materials furnished under a contract, constitutes a new contract between the acceptor and the payee which the latter may enforce in the federal courts, if he is a citizen of a different state from the acceptor and if the amount is the jurisdictional one, although the drawer and the acceptor are both citizens of the same state: Superior City *v.* Ripley, 138 U. S. 93.

[3] Barney *v.* Globe Bk., 5 Blatch. 107. See also Deshler *v.* Dodge, 16 How. 622.

[4] White *v.* Leahy, 3 Dill. 378.

[5] Jones *v.* Shapera, 57 Fed. Rep. 457. But under that act there is no jurisdiction of a suit by the assignee of a judgment to subject thereto property of the judgment debtor standing in the name of a third person, when the assignor is a citizen of the same state as the defendant. Miss. Mills *v.* Cohn, 150 U. S. 202. A note not paid at maturity does not cease to be "negotiable by the law-merchant:" Cross *v.* Allen, 141 U. S. 528.

the act of 1875 a circuit court would have jurisdiction of a bill to foreclose a mortgage given to secure negotiable notes of the mortgagor, which notes and mortgage, by written assignment and delivery, came into the hands of the complainant, he being a non-resident of the state where the suit is brought, and the defendant a resident thereof, although the original payee and assignor could not by reason of his citizenship have brought the suit.[1]

Where a judgment was recovered by a citizen of New York against a citizen of Pennsylvania in the state court of the latter state, and the former assigned the judgment to a citizen of Pennsylvania, whose executors assigned it to an alien, it was held that the latter could maintain a bill in the circuit court to enforce the judgment, notwithstanding the intermediate assignment to a citizen of Pennsylvania.[2]

The assignee of a common chose in action must show affirmatively by his pleading, and, if controverted, by his proofs on the trial, that the obligee could have maintained the suit if no assignment had been made.[3]

It may be safely affirmed that in all cases of suits by assignees upon contracts other than foreign bills of exchange or negotiable corporation notes it is sufficient to give the proper circuit court jurisdiction, so far as the parties are concerned, that they are citizens of different states and that the original assignor could have maintained an action thereon in the circuit court if no assignment had been made at the time of the commencement of the suit by the assignee. If the payee resided in the same state as the maker of a non-negotiable note at the time of its execution, but afterwards removed to another state, he could, of course, maintain an action in the proper circuit court if the amount involved was sufficient. So the assignee of such a party could, under like circumstances of citizenship, maintain an action

[1] Seckel *v.* Backhaus, 7 Biss. 354.

[2] Wilson *v.* Fisher's Executors, 1 Bald. 133 (1830). See also Irvine *v.* Lowry, 14 Pet. 293 (1840). Where the suit is on a non-negotiable promissory note by a non-resident assignee, and against the maker and the payee and indorser, who are residents of the state where the suit is brought, the circuit court would have no jurisdiction: Shufford *v.* Cain, 1 Abb. 302; Keary *v.* Farmers' Bank, 16 Pet. 89.

[3] Bradley *v.* Rhines, 8 Wall. 393; Coal Co. *v.* Blatchford, 11 *id.* 172; Parker *v.* Ormsby, 141 U. S. 81.

thereon, if at the time of the commencement thereof the payee could have maintained it, and it would not affect this right if the payee or assignor should afterwards become a resident of the same state as the maker.[1]

The provision as to the assignee of a chose in action refers only to the citizenship of the assignor, not to the jurisdictional amount: the assignee of several choses in action may recover though none of his assignors had a jurisdictional claim.[2]

Suits by Indorsees.

§ 151. It is evident that, under the existing statutes, an indorsee, being a citizen of a different state from that of an indorser, whether of a corporation note or a foreign bill of exchange, could, so far as citizenship is concerned, maintain an action against the indorser, whether a suit could be maintained by the assignee or the payee against the maker or not.[3]

Corporations Citizens; Bonds and Coupons not Promissory Notes or Bills of Exchange.

§ 152. A corporation is a citizen of the state where it is created, in the sense of the statute requiring the proper citizenship of parties to confer jurisdiction upon the federal courts, it being conclusively presumed that the individual members of it are citizens of such state.[4] This doctrine is applicable to both

[1] Chamberlain *v.* Eckert, 2 Biss. 126; Thaxter *v.* Hatch, 6 McLean 68 (1869); Kirkman *v.* Hamilton, 6 Pet. 20; Jones *v.* Shapera, 57 Fed. Rep. 457; Benjamin *v.* New Orleans, 71 *id.* 758. A general assignee under the insolvent laws of a state is an assignee within the meaning of the statute, and he cannot sue if his assignor could not: Bradford *v.* Jenks, 2 McLean 130; Sere *v.* Pitot, 6 Cr. 332.

[2] Chase *v.* Sheldon Roller Mills Co., 56 Fed. Rep. 625; Bowden *v.* Burnham, 59 *id.* 752.

[3] See Young *v.* Bryan, 6 Wh. 146; Evans *v.* Gee, 11 Pet. 80; Coffee *v.* Planters' Bank, 13 How. 183; Mollan *v.* Torrance, 9 Wh. 537.

[4] Louisville R. Co. *v.* Letson, 2 How. 497 (1844); Marshal *v.* Baltimore, etc., R. Co., 16 *id.* 314; Covington, etc., Co., *v.* Shepherd, 20 *id.* 227; Railroad Co. *v.* Harris, 12 Wall. 65; Railroad Co. *v.* Whitton, 13 *id.* 270. It was formerly held that a corporation was not, in the sense of these statutes, a citizen, and that in order to confer jurisdiction in such cases it was necessary to aver and prove that all the members of it had the requisite citizenship: Bank of U. S. *v.* Deveaux, 5 Cr. 84 (1809); Commercial Bank *v.* Slocomb, 14 Pet. 60 (1840); Ward *v.* Arredondo, 1 Paine 410.

private and municipal corporations. Where bonds were executed by a municipal corporation, with coupons attached, to a railroad corporation, and both corporations were created by and located in the same state, and the bonds and coupons were transferred to the bearer in blank, it was held under the earlier statute that the latter could not sue for the recovery of their contents in the circuit court, as such instruments were not promissory notes negotiable by the law merchant, nor bills of exchange, and the payee or original holder could not maintain a suit thereon in said court for the want of jurisdiction to take cognizance of such suits.[1] But in such a case the action could have been commenced in a state court, and if the value of the amount in controversy exceeded five hundred dollars it might have been removed to the proper circuit court, as it would have been between citizens of different states. This would appear to have been sufficient cause of removal, without regard to the right of the payee or original holder to maintain an action thereon in the circuit court, if the contract had not been assigned; and it would appear that the circuit court would, upon the removal, have acquired jurisdiction of the suit. The provisions of the act of 1888 with regard to instruments made by corporations must, however, be taken into account as qualifying the decisions cited.

Where a Corporate Bond is Payable to Bearer.

§ 153. If a corporate bond is made payable to bearer, and is transferred by mere delivery, and not by a written endorsement or assignment, the holder is not an assignee within the meaning of the act of 1875; and he may bring suit thereon in the circuit court if the amount is sufficient and there is the requisite citizenship of the parties.[2]

[1] Clark *v.* City of Janesville, 1 Biss. (C. C.) 98. See also Sheldon *v.* Sill, 8 How. 441; Deshler *v.* Dodge, 16 *id.* 622; Gibson *v.* Chew, 16 Pet. 315; Dromgoole *v.* Farmers' and Merchants' Bank, 2 How. 241; Thomson *v.* Lee County, 3 Wall. 327. A different rule prevailed where no assignment had been made: City of Lexington *v.* Butler, 14 *id.* 283.

[2] White *v.* Railroad, 21 How. 275; Mercer Co. *v.* Hacket, 1 Wall. 830. See also Bonnafee *v.* Williams, 3 How. 574; White *v.* Vermont and Mass. R. Co., 2 *id.* 575; Halstead *v.* Lyon, 2 McLean 226; Sackett *v.* Davis, 3 *id.* 101 (1842). This point would hardly arise under the act of 1888, corporation instruments in the hands of a "subsequent holder" being especially excepted.

Facts Showing Jurisdiction must be Averred.

§ 154. The circuit courts of the United States have no powers except those conferred by acts of Congress. There are no presumptions in favor of their jurisdiction, and where their judicial action is invoked, the facts upon which their jurisdiction rests must in some form appear in the record. This doctrine is applicable to both civil and criminal cases.[1] They have no common law jurisdiction of criminal cases, it being limited to that conferred by acts of Congress, and they can try no offences except such as are made so by said acts.[2]

As the federal courts have a special and not a general jurisdiction, and there can be no presumption of jurisdiction, it is necessary to make a special allegation of the facts required to give the court jurisdiction in each particular case. Thus, where the jurisdiction depends upon the proper citizenship of the parties, as that they are citizens of different states, that fact should be distinctly averred, and the particular states of which they are citizens should also be alleged.[3]

In case a partnership is a party, it would be sufficient to aver

[1] United States *v.* Eckford, 6 Wall. 484; United States *v.* Bevans, 3 Wh. 336; United States *v.* Hudson, 7 Cr. 32; United States *v.* Clark, 8 Pet. 444; Briscoe *v.* Bank, 11 Cr. 321; United States *v.* Donlan, 5 Blatch. 294; Bank of the United States *v.* Deveaux, 5 Cr. 61; Seldon *v.* Sill, 8 How. 441; Harrison *v.* Hadley, 2 Dill. 229; Hubbard *v.* Northern R. Co., 3 Blatch. 84; U. S. *v.* South. Pac. R. Co., 49 Fed. Rep. 297; Börs *v.* Preston, 111 U. S. 252. It is the duty of the court to recognize the lack of jurisdiction and dismiss of its own motion without reference to the pleadings: Carlsbad *v.* Tibbetts, 51 *id.* 852.

[2] United States *v.* Barney, 5 Blatch. 294.

[3] Hornthall *v.* The Collector, 9 Wall. 560; Mason *v.* Rollins, 13 *id.* 602; Christmas *v.* Russell, 5 *id.* 290; Bingham *v.* Cabot, 3 Dall. 382; Turner *v.* Bank of America, 4 *id.* 8; Gassees *v.* Ballou, 6 Pet. 761; McDonald *v.* Smalley, 1 *id.* 623; Jackson *v.* Twentyman, 2 *id.* 136; Eberly *v.* Moore, 24 How. 157; Shelton *v.* Tiffin, 6 *id.* 163; Shepherd *v.* Graves, 14 *id.* 393; Wickliffe *v.* Owings, 17 *id.* 47; Dred Scott *v.* Sanford, 19 *id.* 395; Laskey *v.* Newtown Min. Co., 50 Fed. Rep. 634. In the Dred Scott case the Supreme Court decided that as it appeared from the record that the plaintiff's ancestors were imported from Africa and sold as slaves, the plaintiff could not be a citizen of a state, and was not entitled to sue in that character in a circuit court of the United States. The district of residence should be averred: it is not sufficient to mention the state where there are two districst there: Harvey *v.* Richm. & M. R. Co., 64 Fed. Rep. 19.

that it is a firm, the members of which are citizens of a different state from that of the other party to the suit. But where there was an averment that the plaintiffs were a firm organized to carry on a banking business at Omaha, Nebraska territory, and had been for eighteen months in said business at that place, it was held that this was a sufficient averment of citizenship.[1]

As a general rule, however, it is safer to aver the facts constituting the proper citizenship of the parties in a positive and distinct manner, and not leave it to be inferred argumentatively from the averments of the declaration or bill.[2]

It has also been held that citizenship and residence are not synonymous but distinct terms.[3] An omission to aver sufficiently the proper citizenship of the parties is, however, amendable;[4] and if the defendant makes no objection to the want of a proper averment of it, and proceeds to trial, the Supreme Court will, on writ of error, grant leave to amend the pleadings in this respect.[5]

In the case of a corporation, its citizenship should be averred to be of the state where it was created, and it would not be necessary to allege, as we have observed, that the members composing it were residents of such state.[6]

An averment in a declaration that the defendant was a corporation created by an act of the legislature of the state of New York, but located and doing business in Aberdeen, in the state of Mississippi, under the laws of that state, was held to be insufficient as an averment that the corporation was a citizen of Mississippi, where the suit was brought, but was in legal effect an averment that the defendant was a citizen of the state of New York.[7]

[1] Express Co. *v.* Kountz Brothers, 8 Wall. 342.

[2] Brown *v.* Keene, 8 Pet. 115.

[3] Parker *v.* Overman, 18 How. 137; Railway *v.* Ramsey, 22 Wall. 322; Everhart *v.* Huntsville College, 120 U. S. 223; Menard *v.* Goggan, 121 *id.* 253; Wolfe *v.* Hartford Life & Ann. Ins. Co., 148 *id.* 389; Tinsley *v.* Hoot, 53 Fed. Rep. 682.

[4] Kelsey *v.* Pennsylvania R. Co., 14 Blatch. 89; Bowden *v.* Burnham, 59 Fed. Rep. 752.

[5] Robertson *v.* Cease, 97 U. S. 646.

[6] See *ante*, § 152.

[7] Insurance Company *v.* Francis, 11 Wall. 210. See also Covington, etc., Co. *v.* Shepherd, 20 How. 227; Manufacturing Co. *v.* Brack, 8 Blatch. 137. An averment that a corporation is organized under the laws of a state is essential; it is not sufficient to aver that it is a citizen of that state: Frisbie *v.* Ches. & O. R. Co., 57 Fed. Rep. 1; Lonergan *v.* Ill. Cent. R. Co, 55 *id.* 550. But such an averment

Implied and Resulting Powers.

§ 155. While the federal courts have a limited and restricted jurisdiction, the mode of practice and procedure may conform to the rules of the common law or chancery practice; and they have certain implied powers necessarily resulting from their institution. Thus they have power to punish for contempt and contumacy, and to enforce the observance of order, as these are necessary to the exercise of those powers expressly conferred.[1]

A Statute Covering the Subject of a former one is Substituted Therefor.

§ 156. We have already alluded to the construction of statutes where two or more refer to the same subjects. In such a case, if the objects are not the same, they may all be valid and stand. But if the whole subject of former statutes is covered by a subsequent one, and the mode of practice or procedure is varied by the latter, it operates by way of substitution, and repeals all the former ones on the same subjects.[2] This doctrine would seem to be applicable in the construction of the act of 1888, relating to the jurisdiction of the circuit courts and the removal of causes thereto from the state courts. The provisions of the Revised Statutes conferring original jurisdiction upon the circuit courts and providing for the removal of causes there from state courts would appear to be repealed by implication by the act of 1888.

Suits under Import, Revenue and Postal Laws, and for the Enforcement of Penalties and the Condemnation of Property.

§ 157. The act of 1888 provides for the jurisdiction of the circuit courts in all suits of a civil nature where the amount or

was held sufficient where no objection was taken by plea in abatement, in Chic. Lumber Co. *v.* Comstock, 71 *id.* 477.

As to the case of joint stock companies not fully possessed of corporate powers, see Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566; Pennsylvania *v.* Quicksilver, etc., Co., 10 *id.* 553; Waltz *v.* Am. Ex. Co., 3 Cent. Law Jour. 157.

[1] United States *v.* Hudson, 7 Cr. 52; United States *v.* Coolidge, 1 Wh. 415; 1 Gallison 488; United States *v.* Bevans, 3 Wh. 336.

[2] United States *v.* Claflin, 97 U. S. 546. So where the jurisdiction of a suit depends upon a statute, a repeal of the statute during the pendency of it takes away the jurisdiction: Insurance Co. *v.* Ritchie, 5 Wall. 541; Philadelphia *v.* The Collector, 5 *id.*

value in controversy exceeds two thousand dollars, and arising under the laws of the United States. This includes all suits arising under any act of Congress, "providing for revenue from imports or tonnage," and "all causes arising under any law providing internal revenue," and "all causes arising under the postal laws."[1] Cognizance may be taken by the circuit courts of such cases, without regard to the citizenship or character of the parties, as well as of suits under statutes for the enforcement of penalties,[2] and the condemnation of property taken as prize if used for insurrectionary purposes.[3] Under the provisions of the act of August 6, 1861, relating to prizes, of which our present statute is a substantial copy, the questions presented to the Supreme Court were whether the circuit courts had jurisdiction of such prizes taken on land; what the proper practice and procedure in such a case should be; and whether the statute covered both personal and real property. It was held that the act covered all descriptions of property, both real and personal, on land or on water; that the circuit court had jurisdiction under the statute of proceedings to condemn property on land, including real estate; and that the procedure in such cases might be in general conformity with the practice in admiralty, but not to the extent of preventing parties from having a jury to try issues of fact, in this respect differing from the strict course of admiralty practice.[4]

Suits under Laws Regulating Immigration and Commerce.

§ 158. The circuit and district courts have, by statute, full and concurrent jurisdiction of all causes, civil and criminal, arising

720; *Ex parte* McCardle, 7 *id.* 506; Hornthall *v.* The Collector, 9 *id.* 561; The Assessors *v.* Osborne, *Ibid.* 567. These decisions are not in conflict with the general rule that repeals by implication are not favored. See *Ex parte* Crow Dog, 109 U. S. 556, 570.

[1] Rev. Stat. § 629, sub. 4. By the Act of June 10, 1890, ch. 407, § 15, 26 Stat. L. 131, 1 Supp. R. S. 751, the circuit courts may review the decisions of general appraisers of imported merchandise. See as to this act, *In re* Muser, 49 Fed. Rep. 831; *In re* Kursheedt Manufg. Co., *Ibid.* 633; Passavant *v.* U. S., 148 U. S. 214; U. S. *v.* Lyon, 8 U. S. App. 573.

[2] Rev. Stat. § 629, sub. 5.

[3] *Ibid.* sub. 6; Rev. Stat. §§ 5308, 5309.

[4] Union Ins. Co. *v.* U. S., 6 Wall. 759. See also The Sarah, 8 Wh. 394; The Vengeance, 3 Dall. As to effect a pardon in such a case, see Armstrong's Foundry, 6 Wall. 766; *Ex parte* Garland, 4 *id.* 380; Morris' Cotton, 8 *id.* 507.

under the immigration acts.[1] The circuit courts have also jurisdiction of cases against common carriers under the interstate commerce laws,[2] and of cases arising under the acts prohibiting contracts, combinations, trusts or conspiracies in restraint of commerce among the several states or with foreign nations.[3]

Suits for the Enforcement of Liens or the Removal of Incumbrances.

§ 159. Provision is made by the eighth section of the act of March 3, 1875, for suits to enforce liens upon or claims to, "or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought," where one or more of the defendants is not an inhabitant of the district, nor found therein, and shall not voluntarily appear thereto. This provision gives a more extended and complete remedy to the plaintiff in these particular cases.[4]

Suits for Seizure under the Slave-Trade Laws.

§ 160. The circuit courts have jurisdiction of all suits arising under the laws relating to the slave-trade. This jurisdiction was conferred by an act of Congress as early as 1794.[5] The cognizance of such cases is vested exclusively in the federal courts, and the state courts could not exercise jurisdiction

[1] Act of March 3, 1891, ch. 551, § 13, 26 Stat. L. 1084, 1 Supp. R. S. 937.

[2] Act of March 2, 1889, ch. 382, § 5, 25 Stat. L. 855, 1 Supp. R. S. 688. And the limitation in the act of 1888 as to the district within which suit may be brought does not apply to suits brought under the Interstate Commerce Act to recover damages for overcharging; such suits may be brought in any district in which the defendant can be found: Van Patten *v.* Chic., M. and St. P. R. Co., 74 Fed. Rep. 981. And see Peo. *v.* Rock Id. and P. R. Co., 71 *id.* 753.

[3] Act of July 2, 1890, ch. 647, § 4, 26 Stat. L. 209, 1 Supp. R. S. 762; Act of August 27, 1894, ch. 349, §§ 73–4, 2 Supp. R. S. 333. By § 77 of the latter act the person injured may sue without respect to the amount in controversy and recover threefold damages. By §§ 74, 75, the proceedings may be by way of petition, and parties not residing in the district may be summoned. A suit by an alien against citizens to enjoin a conspiracy to prevent the loading or unloading of the complainant's ship is within the equitable jurisdiction of the circuit court, independent of any question as to interference with interstate or foreign commerce: Elder *v.* Whitesides, 72 Fed. Rep. 724.

[4] See *ante*, § 146.

[5] Act of March 22, 1794, ch. 11, § 1, v. 1, p. 347.

therein.[1] Under the original statute on this subject, it was held that the court of the district where the original seizure was made, or where the property was first carried and proceeded against if it was seized upon the high seas, had jurisdiction of the case.[2] And under the act of 1794, which provided for the seizure of a vessel, in case of preparing to sail, or causing her to sail, for the purpose of embarking in the slave-trade, it was held that it was not necessary that the vessel should be completely fitted out and ready for sailing before the right of seizure attached, but that it was sufficient if the preparations had proceeded so far as to manifest an intention to sail in violation of the statute.[3]

Suits Arising under the Patent, Copyright and Trademark Laws.

§ 161. All suits arising under the patent or copyright laws of the United States must necessarily be originally instituted in the circuit courts. Their jurisdiction is exclusive,[4] and state courts can take no cognizance of such cases. The subject-matter confers the jurisdiction upon the federal courts in such cases, and the diverse citizenship of the parties is quite immaterial; but it would be necessary to make service of original process in the district where the suit is brought.[5]

If, however, the controversy does not arise out of patent or copyright laws, or depend upon a construction of them, but on a contract of assignment of a patent or copyright, or an interest in it, the circuit courts would have no exclusive cognizance of it;[6] and their jurisdiction in such a case would depend entirely upon the proper citizenship of the parties. Thus, when a suit was

[1] Dred Scott *v.* Sanford, 19 How. 393. See also U. S. Const., art. 1, § 9; Acts of March 3, 1819, May 10, 1800, and January 1, 1808.

[2] The Merino, 9 Wh 391. See also Rev. Stat. § 730, U. S. *v.* Jackalow, 1 Black. 484.

[3] The Emily, 9 Wh. 381 (1824). See also The Wanderer, Sprague 515; The San Jago, 9 Wh. 409.

[4] Rev. Stat. § 711, sub. 5.

[5] Allen *v.* Blunt, 1 Blatch. 480; Ogle *v.* Edge, 4 Wash. 584. See § 144 *supra*, as to the district in which suit should be brought under the acts of 1888 and 1897. A non-resident of a district may be enjoined from infringing a patent when he comes into the district, though not subject to be served or sued there: Kennedy *v.* Penn Iron & Coal Co., 67 Fed. Rep. 339.

[6] Wilson *v.* Sanford, 10 How. 99; Hartshorne *v.* Day, 19 *id.* 211; Goodyear *v.* The Union Rubber Co., 4 Blatch. 63; Goodyear *v.* Day, 1 *id.* 565.

brought by a patentee in a circuit court on a contract governing the rights of the parties to the use of a patented invention, and the defendant admitted the validity of the patent and his use of the same, the Supreme Court held that the circuit court had no jurisdiction of the suit, on the ground of the subject-matter of it, and as the suit was between citizens of the same state the circuit court had no right to take cognizance of the case.[1] So, where a bill was filed for the specific performance of a contract for the transfer of an interest in a patent-right, it was held that this was not alone sufficient to give the court jurisdiction.[2] But the mere fact that a patent-right is alleged in the answer to depend upon a contract does not warrant the dismissal of the cause for lack of jurisdiction, without any finding as to the existence or validity of the alleged contract.[3]

This doctrine would of course apply to contracts relating to the use of a copyright. Thus, where an author made a contract with certain publishers by which he gave them the exclusive right to print a manuscript and publish and sell the same, for which the latter was to pay the author a fixed sum for each copy of the work sold, and with the assent of the author the publishers secured the copyright to the same in their own names; and afterwards the author revised the work, and secured the copyright of the revised edition in his own name, and sought to restrain the publishers from further sales of the work by an injunction from the circuit court, it was held that the subject-matter did not give the circuit court jurisdiction, as the suit was not based upon the copyright laws of the United States, but upon a contract made between the parties.[4]

[1] Hartell *v.* Tilghman, 99 U. S. 547.

[2] Burr *v.* Gregory, 2 Paine 426 (1827). A state court has jurisdiction of a cause of action for specific performance of a contract for the transfer of an interest in a patent right: Marsh *v.* Nichols, 140 U. S. 344. And as to when an action on a written agreement for a patent license is not a case arising under the patent laws and is within the exclusive jurisdiction of the state courts, see Hartell *v.* Tilghman, 99 *id.* 547; Dale Tile Manufg. Co. *v.* Hyatt, 125 *id.* 46; Felix *v.* Scharnweber, *Ibid.* 54; Nash *v.* Lull, 102 Mass. 60.

[3] White *v.* Rankin, 144 U. S. 628. And see Dunham *v.* Bent, 72 Fed. Rep. 60; Young Reversible Lock-Nut Co. *v.* Young L. Co., *Ibid.* 62; Everett *v.* Haulenbeek, 68 *id.* 911.

[4] Pulte *v.* Derby, 5 McLean 328 (1852). See also Boucicault *v.* Hart, 13 Blatch. 47. See also Boucicault *v.* Fox, 5 *id.* 97; Bartlett *v.* Crittenden, 4 McLean 300; and Fulsom *v.*

In case, however, the whole interest in a patent, or the right in certain territory of the United States, is duly assigned and recorded under the provisions of the patent laws, the assignee may sue for infringement of the same, and a circuit court could entertain jurisdiction of the same on the ground of the subject-matter without regard to the citizenship of the parties,[1] and restrain by injunction such infringements.[2]

But if a claim for damages is made, and an injunction is asked to restrain an alleged infringement of a patent-right or copyright, whether by the patentee or author or by his assignee, and the defendant denies the originality of the invention or authorship, or affirms that the patent was made broader than the invention of the patentee, the controversy would be one arising under the patent or copyright laws of the United States, and the subject-matter would give the circuit courts jurisdiction.[3]

It may be observed that the circuit courts always exercise their discriminating power in granting or refusing injunctions to restrain the sale or use of inventions, before a judgment has at law been had sustaining the patent thereto, and in all such cases the infringement should be made clear and palpable before an injunction is allowed.[4]

It may be proper here to observe that Congress has the exclusive power to legislate on the subject of patents, and a state cannot impose any restrictions upon the right of a patentee to sell his invention.[5]

The act of March 3, 1881,[6] providing for the registering of

Marsh, 2 Story 113, as to authority of circuit courts to restrain by injunction unauthorized publications where they have jurisdiction. The common law right of an author to his unpublished manuscript is not abrogated by copyright statutes. The former may be still enforced in the federal courts where the requisite citizenship exists: Press Pubg. Co. *v.* Monroe, 38 U. S. App. 410.

[1] Littlefield *v.* Perry, 21 Wall. 205.

[2] Brown *v.* Shannon, 20 How. 56; Day *v.* Hayward, *Ibid.* 208.

[3] Potter *v.* Muler, 2 Fisher Pat. Cases 465; Potter *v.* Wilson, *Ibid.* 102; Goodyear *v.* Providence Rubber Co., *Ibid.* 499; Burr *v.* Durgee, 1 Wall. 531; O'Riley *v.* Morse, 15 How. 112; Battin *v.* Taggart, 17 *id.* 74.

[4] Cochrane *v.* Duner, 94 U. S. 780; Burleigh Rock Drill Co. *v.* Lobdell, 1 Holmes 450; Guttapercha Co. *v.* Goodyear Co., 3 Saw. 542.

[5] McClurg *v.* Kingsland, 1 How. 206; Blanchard *v.* Sprague, 3 Sum. 279; Payne *v.* Hook, 7 Wall. 425.

[6] Act of March 3, 1881, ch. 138, 21 Stat. L. 502, 1 Supp. R. S. 322.

trademarks used in commerce with foreign nations or Indian tribes, gives the federal courts original and appellate jurisdiction in cases relating thereto, without regard to the amount in controversy. This jurisdiction is concurrent with that of the state courts, and suit cannot be brought against a corporation, under the act of 1888, in a district where it is not incorporated.[1]

Suits by and against National Banks.

§ 162. Associations for the purpose of carrying on banking business under the statutes relating thereto may sue and be sued in the circuit courts of the United States. But their jurisdiction is not exclusive, as it is expressly provided by the fifth subdivision of section 5136 of the Revised Statutes that when such associations are duly organized under the provisions of the statutes they may "sue and be sued, complain and defend, in any court of law and equity as fully as natural persons." They may therefore sue or be sued in any state, county or municipal court, in the county or city where they are located, having jurisdiction of similar cases between natural persons, unless there is some special provision of statute to the contrary.[2] But a national bank could not formerly be sued in a federal court outside the district where it was located.[3] Corporations are residents of the state and district where they are located and established.[4] Now, by the fourth section of the act of 1888 it is expressly provided that "all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the states in which they are respec-

[1] *In re* Keasbey and Mattison Co., 160 U. S. 221. There is no jurisdiction on the ground of a federal question of suits for the infringement of common law trademarks: Prince's Metallic Paint Co. *v.* Prince Manufg. Co., 53 Fed. Rep. 493. Equitable remedies may be administered where the citizenship is diverse: Battle *v.* Finlay, 50 *id.* 106. See also Burt *v.* Smith, 71 *id.* 161.

[2] Bank of Bethel *v.* Pahquioque, 14 Wall. 383; Pittilon *v.* Noble, 7 Biss. 450. And see Petri *v.* Comml. Bk., 142 U. S. 644. They may sue in the federal courts and enjoin the collection of state and county taxes levied upon its capital: First Nat. Bank of Omaha *v.* County of Douglas, 3 Dill. 298; City Nat. Bank *v.* Paducah, 3 Cent. L. J. 347.

[3] Main *v.* Second Nat. Bank of Chicago, 6 Biss. 26.

[4] Day *v.* Newark Ind. Rub. Man. Co., 1 Blatch. 628; Pomroy *v.* N. Y. & N. H. R. Co., 4 *id.* 120. See *ante*, § 152.

tively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."[1]

Suits by Receivers of National Banks.

§ 163. Before a receiver of a national bank can be appointed under the National Banking Act, on the ground of the failure of the bank to pay its notes, it requires certain action on the part of the Comptroller of the Currency;[2] and in any action by a receiver against the stockholders of a bank to enforce their personal liability as provided by the statute, it is necessary that he aver in his bill this preliminary action on the part of the Comptroller; but a receiver can sue as such in the circuit courts without regard to his citizenship,[3] or to the amount,[4] and he may sue for demands due the bank, either in his own name or in the name of the bank, without any order of the Comptroller of the Currency so to do. But it has been held that a state court has no jurisdiction of a suit by a creditor against a receiver of a national bank, duly appointed after the insolvency of a bank, to recover a debt alleged to be due from the bank to him, and that the circuit courts of the United States have exclusive jurisdiction of such cases.[5] The power of the Comptroller of the Currency to proceed in the circuit court to wind up a national bank in certain contingencies, and to appoint a receiver therefor, does not, how-

[1] A national bank cannot remove a suit to the circuit court on the ground that it is a federal corporation: Wichita Nat. Bk. *v.* Smith, 72 Fed. Rep. 568. Nor can the defendant remove because the plaintiff is a national bank: Nat. Bk of Commerce *v.* Galland (Wash.), 45 Pac. Rep. 35. See *Ex parte* Jones, 164 U. S. 691.

[2] Rev. Stat. §§ 5226, 5227.

[3] Kennedy *v.* Gibson, 8 Wall. 498; Linn Co. Nat. Bk. *v.* Crawford, 69 Fed. Rep. 532; Short *v.* Hepburn, 75 *id.* 113. See Robinson *v.* Wilmington, 25 U. S. App. 144, as to a suit against a collector of taxes.

[4] Yardley *v.* Dickson, 47 Fed. Rep. 835.

[5] National Bank *v.* Colby, 21 Wall. 609. But where the bill presented a question of property between the plaintiff and receiver, and they resided in the same state, the circuit court held it had no jurisdiction: Van Antwerp *v.* Hulbard, 8 Blatch. 282. See also Cadle *v.* Tracy, 11 *id.* 101; *In re* Manufacturers' Bank, 5 Biss. 499; Irons *v.* Manufacturers' Bank, 6 *id.* 301.

ever, exclude the authority of other competent tribunals to appoint a receiver in other cases.[1] But the circuit court has no jurisdiction of a suit by a private person to control, restrain or interfere with the official action of the Treasurer or Comptroller of the Currency in respect to bonds deposited to secure the redemption of the circulating notes of banks.[2] It may, however, take cognizance of a suit by a stockholder to enjoin the officers of a national bank from any application of its funds not authorized by its charter, or which would amount to a breach of trust if there is the requisite citizenship of the parties.[3]

Suits to Redress the Deprivation of Rights.

§ 164. Under the act of 1888 the circuit courts would have cognizance of all suits instituted "by any persons to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States, or by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States,"[4] as such suits would be those arising under the Constitution or laws of the United States.[5] The powers of the federal courts under this provision have mainly been invoked to redress the wrongs of colored persons, whose equal rights were undoubtedly intended to be secured by the statutory provisions referred to in the notes.[6]

[1] Irons *v.* Manufacturers' Bank, 6 Biss. 301.

[2] Van Antwerp *v.* Hulbard, 7 Blatch. 426; s. c., 8 *id.* 282.

[3] Shoemaker *v.* The Mechanics' Nat. Bank, 2 Abb. (U. S.) 416; Dodge *v.* Woolsey, 18 How. 341.

The tenth subdivision of Rev. Stat. § 629 has been repealed by the proviso in Act of July 12, 1882, ch. 290, § 4, being an act to enable national banks to extend their corporate existence, etc., and a national bank cannot now institute and maintain a suit against residents of its own state and judicial district: Nat. Bk. *v.* Fore, 25 Fed. Rep. 209; Union Nat. Bk. *v.* Miller, 15 *id.* 703; Price *v.* Abbott, 17 *id.* 506. This section was not repealed by the Act of March 3, 1875: Third Nat Bk. *v.* Harrison, 8 *id.* 721; Whittemore *v.* Amoskeag Nat. Bk., 134 U. S. 527.

[4] Rev. Stat. § 629, sub. 16.

[5] Rev. Stat. §§ 858, 1977, 1979.

[6] Acts of May 31, 1870, and March 1, 1875. See Gowdy *v.* Green, 69 Fed. Rep. 865. By § 5 of the Act of August 13, 1888, the statutes regulating civil rights are not affected by that act.

Appellate Jurisdiction of the Circuit Courts.

§ 165. The earlier statute provided for an appellate jurisdiction of the circuit courts: "From all final decrees of a district court in causes of equity or of admiralty jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars exclusive of costs, an appeal shall be allowed to the circuit court next to be held in such district, and such circuit court is required to receive, hear and determine such appeal."[1] But by the act of March 3, 1891, the appellate jurisdiction of the circuit courts is abolished.[2]

Jurisdiction in Cases Transferred from the District Courts on Account of the Disability of the Judge.

§ 166. The statute provides for the removal of causes from the district to the circuit courts, where the district judge is disabled, or interested in the suit, or has been of counsel for either party, or is related to either party.[3] In such cases the circuit court may take cognizance of the cause if properly certified to it, whether civil or criminal, or of whatever nature, in the same manner as it might have done if the same had originally and lawfully commenced therein.[4]

Always Open for Certain Purposes.

§ 167. It may be well to observe, in this connection, that the circuit courts, as courts of equity, are always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to hearing upon their merits; and any judge of the court may, upon reasonable notice to the parties, at chambers or at the clerk's office, and in vacation as well as in term time, make, direct and award all such process, commissions, orders, rules and other proceedings, whenever they are not grantable of course, according to the rules and practice of the court.[5]

[1] Rev. Stat. § 631.

[2] See § 119 *supra*. This act repeals Rev. Stat. § 631. In Lau Ow Bew *v.* U. S., 144 U. S. 47, it was held that the act of March 3, 1891, placed such reviews directly in the courts created by that act, the entire appellate jurisdiction being distributed. See also Nat. Exch. Bk. *v.* Peters, *Ibid.* 570; North Pac. R. Co. *v.* Amato, *Ibid.* 465. See also Chapter XI *infra*.

[3] Rev. Stat. §§ 587, 588.

[4] Rev. Stat. § 637. See also §§ 587, 601.

[5] Rev. Stat. § 638.

Causes for Removal of Suits from State Courts.

§ 168. By the provisions of various acts of Congress adopted since the Judiciary Act of 1789 the jurisdiction of the circuit courts has been enlarged and their business has been thereby greatly increased. This is largely owing to the liberal provisions therein made for the removal of causes from the state courts. The act of August 13, 1888, provides that "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district.

"Any other suits of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State.

"And when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."[1]

As the conditions and causes for removal are similar to those giving original jurisdiction to the circuit courts in civil cases, it is manifest that decisions construing the statute and determining its application in one class of cases would be equally applicable to the other.[2]

[1] Act of Aug. 13, 1888, ch. 866, §1, 25 Stat. L. 433. By removing the party is precluded from asserting a right to remove to another district: O'Donnell *v.* Atchison, T. and S. F. R. Co., 49 Fed. Rep. 689. Defendants sued in a court of their own state have no right of removal: Martin *v.* Snyder, 148 U. S. 663.

[2] That the right of removal under the act of 1888 is especially restricted to the class of cases in which original jurisdiction is given by § 1, see Mexican Nat. R. Co. *v.* Davidson, 157 U.

Two Classes of Causes for Removal.

§ 169. It will be observed that there are two classes of causes authorizing a removal. In one class of cases mentioned in the statute, a removal may be had without regard to the citizenship of parties, as where a suit of a civil nature at law or in equity arises under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner. In this class of cases the citizenship of the parties is not involved. In the other class of cases the right of removal depends upon the proper citizenship of the parties, and the matter in dispute must be: 1. A controversy between citizens of different states; or, 2. A controversy between citizens of the same state claiming lands under grants of different states; or, 3. A controversy between citizens of a state and foreign states, citizens or subjects. Suits belonging under the second category of this latter class of cases, or in which the United States are plaintiff or petitioner, may be removed irrespective of the amount in dispute.[1] In all other cases the matter in dispute must exceed, exclusive of interest and costs, the sum of two thousand dollars.

All Suits of a Civil Nature.

§ 170. It must be a controversy of a civil nature, at law or in equity, which can be removed.[2] This embraces all suits on contracts as well as for torts,[3] and all kinds of actions cognizable in

S. 201; *In re* Cilley, 58 Fed. Rep. 977. And see, in general, as to the removal of cases: St. Paul and Chic. R. Co. *v.* McLean, 108 U. S. 212; Cable *v.* Ellis, 110 *id.* 389; Ayres *v.* Wiswall, 112 *id.* 187; Hancock *v.* Holbrook, *Ibid.* 229; *In re* Pennsylvania Co., 137 *id.* 451.

[1] See § 122 *supra*; U. S. *v.* Sayward, 160 U. S. 493. Cf. § 174 *infra* where the right to move for information as to a claim of grant from another state is made by statute dependent on the matter in dispute exceeding two thousand dollars.

[2] See § 120 *supra*. The right to remove does not depend upon the form of the original action, if its essential character is one that the federal court may determine: Wilson *v.* Smith, 66 Fed. Rep. 81. But where by state statutes equitable defences may be made to actions at law, on removal the matters in law and equity must be separated and equitable relief must be sought by a separate suit: *In re* Foley, 76 Fed. Rep. 390.

[3] Vannevar *v.* Bryant, 21 Wall. 41; Fouvergne *v.* New Orleans, 18 How. 470; *In re* Turner, 3 Wall. Jr. 260; Beecher *v.* Gillett, 1 Dill. 308; Allin *v.* Robinson, *Ibid.* 119; Dennistoun *v.*

courts of equity.[1] It covers a suit in a state court to restrain or stay the execution of a judgment of a state court; and suits not regularly brought in a state court, such as suits pending in a state court, but brought there under the provisions of the statute of a state, from an appraisement of lands by commissioners duly appointed for that purpose, which is sought to be appropriated by a corporation under the right of eminent domain.[2]

Suits Arising Under the Constitution or Laws or Treaties of the United States.

§ 171. Under the section above referred to, the cause of removal depends upon the suit "arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority."

The petition in such a case should show, by the facts and circumstances stated therein, that some disputed question of construction of the Constitution or laws of the United States, or some treaty made under their authority, is involved in the suit; and it is not sufficient that the petitioner states merely his opinion or conclusion that the suit arises under the Constitution or laws of the United States, or a treaty made by their authority.[3] And if the suit is to determine the rights of claimants to mines, and the only questions presented relate to the local laws, rules, regulations and customs by which the rights of the parties are governed, and whether the parties have observed them, this is not a ground for jurisdiction or removal.[4]

Draper, 5 Blatch. 336; Gibbs *v.* Usher, 1 Holmes 348.

[1] Charter Oak Co. *v.* Star Insurance Co., 6 Blatch. 208; Gaines *v.* Fuentes, 92 U. S. 10; Parker *v.* Overman, 18 How. 137.

[2] West *v.* Auroria, 6 Wall. 139; Patterson *v.* Boone Co., 3 Dill. 465; Marshall *v.* Holmes, 141 U. S. 589.

[3] Gold W. and W. Co. *v.* Keyes, 96 U. S. 199; Wilder *v.* Union National Bank, 12 C. L. N. 75; Oregon Short Line & U. N. R. Co. *v.* Skottowe, 162 U. S. 490; Los Angeles Farming & M. Co. *v* Hoff, 48 Fed. Rep. 340. And see Tenn. *v.* Union & P. Bank, 152 U. S. 454; Pac. Gas Imp. Co. *v.* Ellert, 64 Fed. Rep. 421. This should appear in the plaintiff's statement of his claim; it is not sufficient that it appears in the petition or in subsequent pleadings: Postal Teleg. Cable Co. *v.* Ala., 155 U. S. 482; Chappell *v.* Waterworth, *Ibid.* 102.

[4] Trafton *v.* Nougues, 4 Saw. (C. C.) 178; The 420 Mining Co. *v.* The Bullion Mining Co., 3 Saw. 634; Dowell *v.* Griswold, 5 *id.* 39; Bertonneau *v.* Directors, 3 Woods (C.C.) 177; Burrow *v.* Hunton, 99 U. S. 80.

If a judgment in a suit depends upon a proper construction of the Constitution or laws of the United States, the suit may be removed;[1] but the Constitution will not be construed so as to authorize the federal courts to correct mere abuses of power committed by a state government.[2] The following case is one where original jurisdiction was entertained on the ground of a constitutional question being presented, but the facts of the case would also authorize a removal from a state court to the proper circuit court, and confer jurisdiction upon the latter.

A suit was instituted in the state of Connecticut to restrain the collection of taxes levied on the real estate of the plaintiff, for the satisfaction of taxes assessed against him by reason of his ownership of certain bonds, executed and made payable in the state of Illinois and secured by a trust deed upon real estate therein situated, the statute of the state of Connecticut providing for such assessment and levy in that state. The question presented in the circuit court where the suit was brought was whether the statute authorizing such assessment and levy in Connecticut was repugnant to the Constitution of the United States. The case was taken by writ of error to the Supreme Court, which held that the statute of Connecticut authorizing such levy was not repugnant to the Constitution of the United States. The court says: "So long as the state by its laws prescribing the mode and subjects of taxation does not trench upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States, this court, as between the state and its citizens, can afford him no relief against state taxation, however unjust or oppressive or erroneous."[3]

And see St. Paul, M. & M. R. Co. *v.* St. Paul & N. P. R. Co., 68 Fed. Rep. 2.

[1] Cohens *v.* Virginia, 6 Wh. 264; Osborne *v.* Bank, 9 *id.* 821; United States *v.* Peters, 5 Cr. 115; Ableman *v.* Booth, 21 How. 506; Thurston *v.* Union Pacific R. Co., 3 Dill. 366; Capital City Gas Co. *v.* Des Moines, 72 Fed. Rep. 818.

[2] St. Louis *v.* The Ferry Co., 11 Wall. 423; State Tax on Foreign-held Bonds, 15 *id.* 300. The claim that a municipal ordinance impairs the obligation of a contract is not sufficient unless the ordinance was or was supposed to be authorized by a law of the state: Hamilton G. L. & C. Co. *v.* Hamilton, 146 U. S. 258.

[3] Kirtland *v.* Hotchkiss, 100 U. S. 491. See also Providence Bank *v.* Billings, 4 Pet. 563.

Either Party may Remove when the Controversy is between Citizens of Different States.

§ 172. It will be observed that the section under consideration provides that where the "controversy is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."[1]

The Supreme Court of the United States, in construing the former provision of the act of 1875 allowing a removal by either party of suits in which there shall be a controversy between citizens of different states, say: "This we understand to mean that where the controversy about which a suit in the state court is brought is between citizens of one or more states on one side and citizens of other states on the other side, either party to the controversy may remove the suit to the circuit court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purpose of removal the matter in dispute may be ascertained, and the parties to the suit ranged on the opposite sides of the dispute. If in such arrangement it appears that those on one side are all citizens of different states from those on the other, the suit may be removed."[2]

Under former statutes the right of the parties to remove a cause depended upon the position they occupied as plaintiffs or defendants in the pleadings.[3] But under the present law the parties are placed upon different sides of the suit, according to the facts of the case; and where all of the defendants desire a removal, they are entitled to it, if the requisite citizenship exists;

[1] A suit by a state against a citizen of another state is not removable: Postal Telegr. Cable Co. *v.* Ala., 155 U. S. 482; State *v.* Tolleston Club, 53 Fed. Rep. 18. Nor a suit against an alien defendant who is a resident: Rooker *v.* Crinkley, 113 N. C. 73. A *quo warranto* suit to test the defendant's title to an office in a state corporation is not removable on the ground of diverse citizenship between the defendant and the relator: Place *v.* Illinois, 69 Fed. Rep. 481.

[2] Waite, C. J., in Removal Cases, 100 U. S. 457. And see Evers *v.* Watson, 156 *id.* 527.

[3] Coal Co. *v.* Blatchford, 11 Wall. 174. Under sec. 12 of the Judiciary Act, it was held that it was not necessary for all the parties entitled to a removal to join therein at one time: Field *v.* Lownsdale, 1 Deady 288.

that is, if those on one side are all citizens of different states from those on the other.[1]

In *Removal Cases*, above cited, Mr. Justice Bradley, while concurring with the opinion of the court therein given, maintained a broader interpretation of the statute, sustained by the following argument: "In my judgment a controversy is such, as the expression is used in the Constitution and in the law, when any of the parties on one side thereof are citizens of a different state or states from that of which any of the parties on the other side are citizens. . . . It seems to me clear that in construing the present law we are not bound by the construction given to the old Judiciary Act. The words of that act, conferring jurisdiction upon the circuit courts in respect to citizenship, were not the same as those used by the present law or by the Constitution. It only conferred jurisdiction when 'the suit is between a citizen of a state where the suit is brought and a citizen of another state.' The singular number only was used, and the courts, in applying the law to cases in which there was a plurality of plaintiffs and defendants, construed it (perhaps unjustly) as requiring that each plaintiff and each defendant should have the citizenship required by law. But now it is not so. The present law follows the language of the Constitution, and gives the jurisdiction to the circuit courts in the broadest terms, namely, whenever in any suit there is 'a controversy between citizens of different states;' and this broad and general expression, as I think I have shown, gives jurisdiction where any of the contestants on opposite sides of the controversy are citizens of different states."[2]

Where a suit was brought in a state court for the recovery of lands and damage for the detention of them, and the whole controversy, so far as the title was concerned, was between the plain-

[1] The act of 1888 is similar to that of 1875, except that the right to remove is limited to defendants. The later act should therefore be construed as to defendants as the prior act was: N. Y. Constrn. Co. *v.* Simon, 53 Fed. Rep. 1.

[2] See also Girardy *v.* Moore, 3 Woods (C. C.) 379 (1887); Pettelon *v.* Noble, 7 Biss. (C. C.) 449. If a person who is a party to the suit joins with one who is not, in a petition for removal, this does not affect the right of the real party, as the petition will be treated in legal effect as his own petition: Meyer *v.* Delaware R. Co., 100 U. S. 457. But one not a party may not remove, though he is interested: Bertha Zinc & M. Co. *v.* Carico, 61 Fed. Rep. 132.

tiff, a citizen of the state where the suit was brought, and some defendants, also citizens of that state, and others, citizens of other states, but the latter had no rights separate from the other defendants, and they were dependent wholly upon the resident defendants' right to the possession of the property, it was held that the controversy was not removable.[1]

Where a decree of a state court was rendered in 1874, and an appeal therefrom was taken in 1876 to the supreme court of the state, and in 1877 the decree was reversed and the cause remanded, "with leave to both parties to amend pleadings as they may be advised, and to take testimony, and for an account to be taken in accordance with the views taken in the opinion" of the court, and on the day after the mandate from the supreme court was received in the court of original jurisdiction, the defendant filed his petition praying that, by reason of the citizenship of the parties, the cause be removed to the proper circuit court, it was held that neither the date when nor the stage of the cause at which the petition was filed precluded the removal.[2]

A suit cannot be removed from a state court to the circuit court unless either all the parties on one side of the controversy are citizens of different states from those on the other side, or there is in such a suit a separable controversy, wholly between some of the parties who are citizens of different states, which can be fully determined as between them.[3]

[1] Corbin *v.* Van Brunt, 105 U. S. 576. A partition suit in a state court cannot be removed by reason of a controversy between the plaintiff and a citizen of another state intervening and claiming whatever may be set off to the plaintiff: Torrence *v.* Shedd, 144 U. S. 527. The petition of a city in a state court against the lessor and the lessee of a parcel of land to condemn it for the purpose of extending a street cannot be removed into the circuit court upon the ground of a separable controversy between the lessee and the plaintiff: Bellaire *v.* Balt. & O. R. Co., 146 *id.* 117.

[2] Hewit *v.* Phelps, 105 U. S. 393; distinguished from Jifkins *v.* Sweetzer, 102 *id.* 177. Section 643 of the Revised Statutes is not superseded by the act of March 3, 1875, ch. 137: Venable *v.* Richards, 105 U. S. 636; 1 Hugh. 326. Nor by the act of 1888. See § 5 of this act.

[3] Hyde *v.* Ruble, 104 U. S. 407. This case also holds that the second clause of § 639 of the Revised Statutes was repealed by the act of March 3, 1875, But it is not essential to removal that either party should be a citizen of the state in which the suit is brought: the restriction as to diverse citizenship in the act of 1888 does not apply to jurisdiction by removal: Duncan *v.* Associated Press, 81 Fed. Rep. 417.

Where One Party is an Alien.

§ 173. In considering the grounds of original jurisdiction of the circuit courts, we have shown that where an alien is a party, the other party must be a citizen of a state, and that it is not sufficient to allege that one party is an alien, but it is necessary to aver that he is a subject or citizen of some one foreign state; and that it is no objection to the jurisdiction of the court in such a case that the alien resides in the same state with the other party.[1] The same doctrine would apply in the case of an application for removal. We have also shown that a corporation is a citizen of the state creating it.[2] So also a corporation may be an alien; and where a suit is between a citizen of a state and an alien corporation, this would confer original jurisdiction upon the circuit courts, and constitute a cause of removal on the ground of citizenship.[3]

Manner of Removal.

§ 174. The mode or manner of removal of causes from the state to the circuit courts is specifically pointed out by the statute; but, as is usual with new statutes, new questions have been presented to the federal courts, requiring a construction of it. The act of 1888 provides: "That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly

[1] See *ante*, § 138.
[2] See *ante*, § 152.
[3] Terry *v.* The Imperial Fire Ins. Co., 3 Dill. 408.

removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein.

"It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit;

"And the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court.

"And if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information or otherwise not be allowed to plead such grant or give it in evidence upon the trial;

"And if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district;

"And any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim."[1]

When the Petition for Removal must be Filed.

§ 175. Under the act of 1875 the petition must have been filed in the state court "before or at the term at which said cause could

[1] Act of August 13, 1888, ch. 866, 493, cited in §§ 122, 169 *supra*. § 1. See U. S. *v.* Sayward, 160 U.S.

first be tried, and before the trial thereof." If the suit was pending at the time of the passage of the act, an application for removal would have been in time if made before the trial and at the first term of the court after its passage. Where a trial was had in a state court, but there was a disagreement of the jury in the case, and the cause was continued until the next term, at which term it was again continued till the following one, when a petition for removal was filed, it was held proper not to grant it.[1] This application did not comply with the provision of the statute requiring it to be made before or at the next term at which the cause could be tried.

But where one trial was had and the judgment was set aside or vacated, so that the cause stood again for a new trial, a petition for removal might then have been made as if there had been no trial. In case of a reversal of a judgment of a state court on appeal or error, the right to another trial must have been perfected before the application could be made.[2] Thus where the supreme court of a state reversed the judgment of a state court and granted a new trial, but on application allowed a rehearing of the same, it was held that the supreme court of the state still held jurisdiction, and that a petition filed in the meantime for a removal of the cause from the state to the circuit court was premature.[3]

The petition must be presented to the court before the trial is entered upon; but to bar the right of removal on this ground it must appear that the trial was actually and in good faith begun when the application was made; and no mere attempt of a party to get himself on the record as having commenced the trial will avail him.[4] These decisions must be somewhat modified, however, to accord with the provision of the act of 1888 that the petition is to be filed "at the time, or any time before the defen-

[1] Bible Society *v.* Grove, 101 U. S. 610; Removal Cases, 100 *id.* 457.

[2] Insurance Co. *v.* Dunn, 19 Wall. 214. And see Schraeder Mining & Manufg. Co. *v.* Packer, 129 U. S. 688.

[3] Railroad Co. *v.* McKinley, 99 U. S. 147. See also Lowe *v.* Williams, 94 *id.* 650; Vannevar *v.* Bryant, 21 Wall. 41; Dart *v.* McKinney, 9 Blatch. 359; Atlee *v.* Potter, 4 Dill. 559; McColough *v.* School Furniture Co., *Ibid.* 563; Palmer *v.* Call, *Ibid.* 566.

[4] Removal Cases, 100 U. S. 457; Baker *v.* Peterson, 4 Dill. 562; Hadley *v.* San Francisco, 3 Saw. 553; Merchants' and Man. Nat. Bk. *v.* Wheeler, 13 Blatch. 218.

dant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."[1]

The Act must be Substantially Complied with; Sufficiency of the Bond.

§ 176. It is essential that the provisions of the section be at least substantially complied with. A bond with good and sufficient surety must be filed with the petition for removal; and hence where the bond given on the application for a removal contained a blank space where the penalty of the bond should have been inserted, it was held not to be a compliance with the statute, and consequently that no right of removal existed.[2]

[1] The petition must be filed as soon as the defendant is required to make any defence whatever in the state court, either in abatement or on the merits: Martin *v.* Balt. & O. R. Co., 151 U. S. 673. The statutory time is, however, a mere limitation that may be waived by the failure of the plaintiff to object. But where the removal is too late and the plaintiff, in ignorance of the construction of the law, answers, he may withdraw the answer and file a motion to remand where he is not speculating on the chances: Collins *v.* Stott, 76 Fed. Rep. 613. See Hecht *v.* Metzler, 82 Fed. Rep. 340, as to waiver of the right to remove where a new state has been created.

A motion by the defendant for the dissolution of an injunction is not a plea or answer, in the statutory sense: Garrard *v.* Silver Peak Mines, 76 Fed. Rep. 1. The filing of the petition is not necessarily a waiver of defects in the service of summons: Goldey *v.* Morning News, 156 U. S. 518. And see N. Y., L. E. & W. R. Co. *v.* Estill, 147 *id.* 591.

The federal court must decide whether the petition is filed in time and also all issues of fact on the petition: Fidelity Trust & Safety Vault Co. *v.* Newport News & M. V. Co., 70 Fed. Rep. 403.

And see, in general, as to the time of filing the application: Balt. & O. R. Co. *v.* Bates, 119 U. S. 464; Core *v.* Vinal, 117 *id.* 347; Bank of Maysville *v.* Claypool, 120 *id.* 268; Laidly *v.* Huntington, 121 *id.* 179; Kan. City F. S. & M. R. Co. *v.* Daughtry, 138 *id.* 298; Manning *v.* Amy, 140 *id.* 137; Rosenthal *v.* Coates, 148 *id.* 142; Fisk *v.* Henarie, 142 *id.* 459; Detroit *v.* Detroit City R. Co., 54 Fed. Rep. 1; Mattoon *v.* Reynolds, 62 *id.* 417; Cookerly *v.* Gr. North. R. Co., 70 *id.* 277; Mahoney *v.* New S. B. & L. Assn., *Ibid.* 513; First Littleton Bridge Corp. *v.* Conn. River Lumber Co., 71 *id.* 225; Schipper *v.* Consumer C. Co., 72 *id.* 803; Security Co. *v.* Pratt, 65 Conn. 161; Font *v.* Gulf State L. & I. Co., 47 La. Ann. 272.

[2] Burdick *v.* Hale, 7 Biss. 96. And see Cleveland, C., C. & St. L. R. Co. *v.* Monaghan, 140 Ill. 474. The state court has no discretion in the matter: Meyer *v.* Del. R. C. Co., 100 U. S. 457. But while the removal bond should properly state a penal sum, its failure to do so is not ma

The petition for the removal should state the grounds of the removal clearly, whether arising from the subject matter or the citizenship of the parties, and the sufficiency of the amount in controversy, where that is required; and if the right of removal is based upon the citizenship of the parties in different states, the record or petition should show this affirmatively, and that at the time of the commencement of the suit the parties were citizens of different states.[1]

Where the petition shows proper grounds for removal, and is duly verified and filed, with a proper and sufficient bond, it is the duty of the court to accept the petition and bond, and proceed no further in the case; in fact it has no further jurisdiction of it; but if the court refuses to allow a removal, and the party entitled thereto defends the action in the state court, he loses none of his rights by so doing.[2]

The State Court may pass upon the Sufficiency of the Application for Removal.

§ 177. There is no right to a removal until a good petition and a bond with a good and sufficient surety are filed in the state court. These are conditions precedent to the right of removal; and the question whether they comply with the law must, in the first instance, be decided by the state court. The court in such cases is called upon to yield its jurisdiction to another court, on the ground of a compliance with certain statutory conditions, and it

terial on a motion to remand: Johnson *v.* F. C. Austin Manufg. Co., 76 Fed. Rep. 616.

[1] Insurance Co. *v.* Pechner, 95 U. S. 183; Abranches *v.* Schell, 4 Blatch. 256; Thurston *v.* Union P. R. Co., 3 Dill. 366; Railway Co. *v.* Ramsey, 22 Wall. 322; Kaeiser *v.* Illinois Central R. Co., 2 McCrary 187; Stevens *v.* Nichols, 130 U. S. 230; La Confiance Compagnie *v.* Hall, 137 *id.* 61; Foster *v.* Paragould S. E. R. Co., 74 Fed. Rep. 273; Kellam *v.* Keith, 144 U. S. 568; Denny *v.* Pironi, 141 *id.* 121. Where there is a general allegation of diverse citizenship, a defective allegation that the plaintiff is a "resident" may be amended: Johnson *v.* F. C. Austin Manufg. Co., 76 Fed. Rep. 616. The facts must be sufficiently set forth, not conclusions of law: Carson *v.* Dunham, 121 U. S. 421. The failure of one of the defendants to join in the petition where the case is not separable is fatal: Thompson *v.* Chic., St. P. and K. C. R. Co., 60 Fed. Rep. 773.

[2] Removal Cases (Meyer *v.* Del. R. Co.), 100 U. S. 457; McMullen *v.* North Pac. R. Co., 57 Fed. Rep. 16. On filing of the petition and bond in the state court the case is *eo instanti* removed: Hayes *v.* Todd, 34 Fla. 233; Wills *v.* Balt. and O. R. Co., 65 Fed. Rep. 532.

would appear reasonable that the state court should be allowed to pass upon this question.[1] The amount of the penalty and the required conditions should be inserted in the bond.[2]

In case of a good and sufficient petition and bond being filed in the state court, the better practice would be for the court to make an order for the removal of the cause. But this does not seem to be absolutely necessary.[3]

Where a sufficient cause for removal is shown by a petitioner, therefore, it is the duty of the state court to proceed no further with the suit. The jurisdiction of the proper circuit court then attaches, and is not lost by the failure of the petitioner to enter the record and docket the cause on the first day of the next term of the circuit court; but the entry on a subsequent day may be permitted upon good cause shown, and good cause is shown where the petition for removal has been overruled by the state court and the petitionor forced to trial upon the merits; and he loses no right by contesting the suit on its merits in the state courts in such a case.[4]

[1] Removal Cases (Meyer *v.* Delaware R. Co.), 100 U. S. 457, where it was also held that it is not necessary that two persons should sign the bond as sureties. In North Amer. L. and T. Co. *v.* Colonial and U. S. Mort. Co., 3 S. D. 590, it is held that a bond is a matter of courtesy to the state court and that actual presentation is not necessary.

[2] Burdick *v.* Hale, 7 Biss. 96.

[3] Osgood *v.* Chicago, D. and V. R. Co., 6 Biss. 330; Connor *v.* Scott, 4 Dill. 242; Commercial and Sav. Bk. *v.* Corbett, 5 Saw. 172. The finding of the circuit court that the application is sufficient does not of itself work a removal; an order of court is necessary: Pennsylvania Co. *v.* Bender, 148 U. S. 255.

[4] Railroad Company *v.* Koontz, 104 U. S. 5; Gordon *v.* Longest, 16 Pet. 97; Insurance Co. *v.* Dunn, 19 Wall. 214. See also King *v.* Worthington, 104 U. S. 44. The state court is not bound to surrender its jurisdiction of the suit until the petitioner makes out a *prima facie* case, and if this is done and the removal is refused and the state court proceeds with the case, its ruling is reviewable by the Supreme Court of the United States after final judgment: Stone *v.* So. Car., 117 U. S. 430. An issue of fact must be tried by the circuit, not by the state court: Burlington, C. R. & N. R. Co. *v.* Dunn, 122 U. S. 513; Kan. City, F. S. & M. R. Co. *v.* Daughtry, 138 *id.* 298; Sinclair *v.* Pierce, 50 Fed. Rep. 851. Where the case is removed and tried without objection to the jurisdiction, a new trial will not be granted to enable such objection to be made. The party will be left to his remedy by writ of error: Mulcahey *v.* Lake Erie & W. R Co., 69 Fed. Rep. 172. A fatal defect in the allegation of diverse citizenship cannot be corrected in the circuit court: Crehore *v* Ohio & Miss. R. Co., 131 U. S. 240.

Personal Citizenship of the Parties.

§ 178. Where jurisdiction or the right of removal depends upon the proper citizenship of the parties, it requires the personal citizenship of them, even though they may act in a representative capacity, as executors or administrators. Thus, where a suit was brought by executors, and a petition for a removal averred that they, personally, had the required citizenship, it was held sufficient.[1] But merely nominal parties cannot affect the right whatever may be their citizenship.[2]

When a Controversy is wholly between Citizens of Different States.

§ 179. A part or fragment of a cause cannot be removed.[3] But when in any suit mentioned in section 1 of the act of 1888 there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between *them*, then either one or more of the defendants actually interested in such controversy may remove the suit.[4]

Removal on Account of Prejudice or Local Influence.

§ 180. The act of 1888 repeals the third subdivision of section 639 of the Revised Statues, and provides that "where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be

[1] Amory *v.* Amory, 95 U. S. 186; Craigie *v.* McArthur, 4 Dill. 474. Official citizenship is not sufficient: Wilson *v.* Smith, 66 Fed. Rep. 81. The record should show the proper citizenship: Bible Society *v.* Grove, 101 U. S. 610; Insurance Co. *v.* Pechner, 95 *id.* 183.

[2] See *ante*, § 126.

[3] State *v.* Day Land and Cattle Co., 49 Fed. Rep. 593.

[4] Harvey *v.* Ill. Mid. R. Co., 7 Biss. 103; Carraher *v.* Brennan, *Ibid.* 497; Arapahoe Co. *v.* Kansas Pac. R. Co., 4 Dill. 277; Removal Cases, 100 U. S. 457. And see Bellaire *v.* Balt. & O. R. Co., 146 *id.* 117; Torrence *v.* Shedd, 144 *id.* 527; Rosenthal *v.* Coates, 148 *id.* 142; Merch. Cotton Press & Storage Co. *v.* Ins. Co. of N. Amer., 151 *id.* 368; Sugar Creek, P. B. & C. P. R. Co. *v.* McKell, 75 Fed. Rep. 34; Lake Street E. R. Co. *v.* Farmers' L. & T. Co., 72 *id.* 804; O'Harrow *v.* Henderson, 52 *id.* 769; N. Y Constrn. Co. *v.* Simon, 53 *id.* 1; Ins. Co. of N. Amer. *v.* Del. Mut. Ins. Co., 50 *id.* 243.

made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein."

The right of removal under this provision depends not only upon the proper citizenship of the parties, but upon prejudice or local influence; and suits cannot be removed on these grounds, unless they are between a citizen of the state in which the suit is brought and a citizen of another state, and then only on the petition of the non-resident party.[1] Under the act of 1888 the right to remove does not extend to the plaintiff.[2] The defendant must state facts showing prejudice or local influence.[3] And the right extends not only to cases where such prejudice would affect the jury, but also to those in which the decisions of the judge as to questions of law or fact may be affected thereby.[4]

Application must be made to a State Court of Original Jurisdiction.

§ 181. The statute authorizing the removal of causes from a state to the circuit court has been construed to authorize a removal only from a state court of original jurisdiction. If a cause has been tried in a state court of original jurisdiction and an

[1] Bible Society *v.* Grove, 101 U. S. 610; Cook *v.* Ford, 4 Cent. L. J. 561; 2 C. L. B. 108. See also Hurst *v.* W. & A. R. Co., 93 U. S. 71; Grand Trunk R. Co. *v.* Twitchell, 59 Fed. Rep. 727; Dahlonega Co. *v.* Hall Merch. Co., 88 Ga. 339; New Orleans, Ft. J. & G. I. R. Co. *v.* Rabasse, 44 La. Ann. 178.

[2] Fisk *v.* Henarie, 142 U. S. 459; Meyer Bros. Drug Co. *v.* Malin, 47 Kan. 762; Campbell *v.* Collins, 62 Fed. Rep. 849.

[3] Schwenk *v.* Strang, 59 Fed. Rep. 209. One defendant may remove on this ground whether the controversy is separable or not: Haire *v.* Rome R. Co., 57 Fed. Rep. 321.

[4] Detroit *v.* Detroit City R. Co., 54 Fed. Rep. 1, following Burgess *v.* Seligman, 107 U. S. 33.

appeal taken therefrom, or a writ of error obtained, and the cause stands for a rehearing in the appellate court of a state, it cannot be removed from thence to a circuit court of the United States under the federal statutes providing for the removal of causes from a state court to a circuit court of the United States.[1]

Removal in Case of Suits against Corporations organized under Laws of the United States.

§ 182. The Revised Statutes provide that "any suit commenced in any court other than a circuit or district court of the United States, against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof as such member, for any alleged liability of such corporation or of such member as a member thereof, may be removed for trial in the circuit court for the district were such suit is pending, upon the petition of such defendant verified by oath, stating that such defendant has a defence arising under or by virtue of the Constitution or of any treaty or law of the United States. Such removal in all other respects shall be governed by the provisions of the preceding section."[2] But this section was expressly repealed by section 6 of the act of August 13 1888, with a proviso that no pending case should be affected.

Removal of Causes, Civil or Criminal, against Persons denied any Civil Right.

§ 183. Section 641 of the Revised Statutes provides that "when any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in that part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all

[1] Stevenson *v.* Williams, 19 Wall. 572; Railroad Co. *v.* McKinley, 99 U. S. 147. The provision of the Illinois statute as to the time allowed in which to vacate a judgment in the state courts applies to the circuit court where a case has been removed there: Smale *v.* Mitchell, 143 U. S. 99.

[2] Rev. Stat. § 640. See for decisions under this section, Fish *v.* Union Pac. R. Co., 8 Blatch. 243; Fisk *v.* Union Pac. R. Co., 6 *id.* 362; Jones *v.* Oceanic Steam Nav Co., 11 *id.* 406; Turton *v.* Union Pac. R. Co., 3 Dill. 366; Farmers Co. *v.* Central R. Co., *Ibid.* 379; Magee *v.* Union Pac. R. Co., 2 Law. (C. C.), 447.

persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment, or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending." The section further provides that bail or other security given shall continue, that the clerk of the state court shall furnish the defendant a copy of the record, and that when it is properly filed in the circuit court, such court shall have cognizance of the same as if originally commenced there; that if the clerk refuses to furnish a copy, the circuit court may require the plaintiff, upon reasonable notice, to file a declaration, petition or complaint in the cause, and on failure so to do may order a non-suit and dismiss the cause; and that if, without the refusal of the clerk to furnish such copy, the defendant fails to file such copy in the circuit court as aforesaid, a certificate thereof is required to be given by the clerk of the circuit court, upon the production of which in the state court the cause shall proceed as if no petition for a removal had been filed.

Under this section it has been held that the denying of any right secured to a person by any law providing for the equal civil rights of citizens of the United States means a denial by some statutory provision of the state or by legislative action, and an inability to enjoy some right secured to him by the Constitution of the United States or acts of Congress providing for the equal civil rights of citizens of the United States. And it is incumbent upon the defendant who seeks a removal under this section to state the facts upon which he bases his claim for removal in his petition, duly verified by his oath, and it is not sufficient to state his belief that he cannot enforce his rights at some subsequent stage of the proceedings, as the statute has no application to judicial infractions of the constitutional amendment securing equal rights after the trial has commenced. And if there is a failure to show the facts in the petition which entitle the petitioner to a removal,

the circuit court has no power to try a cause on removal, and should remand it to the state court.[1]

A criminal prosecution cannot be said to have commenced, in the sense of the law, in the state court until after an indictment is found. The object of the statute was evidently to provide a remedy for the infraction of those rights secured by the provisions of the fourteenth amendment of the Constitution to a recently emancipated race which had for a long time been held in slavery, and to give them the protection of the laws in the enjoyment of such rights.[2]

When the Petitioner is in Actual Custody of a State Court.

§ 184. If the defendant petitioning for a removal of a cause, as provided by the section of the statute last referred to, is in actual custody under process issued by the state court, and his petition for the removal of the cause has been duly filed in the circuit court, it is the duty of the clerk of said court to issue a writ of *habeas corpus cum causa;* and it is the duty of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said court according to law and the orders of said court, or of any judge thereof in case of vacation; and it is made the duty of the marshal, in such a case, to file with or deliver to the clerk of the state court a duplicate copy of said writ.[3]

Removal of Suits and Prosecutions against Revenue and other Federal Officers.

§ 185. "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting

[1] Virginia *v.* Rives, 100 U. S. 313. This provision was held not to be in conflict with the Constitution of the United States: Strauder *v.* West Virginia, 100 U. S. 303. The right to remove does not embrace a case where the civil right is denied during trial or in the sentence; it is confined to a denial resulting from the Constitution or laws of the state: Gibson *v.* Miss., 162 U. S. 565; Murray *v.* La., 163 *id.* 101. And see Smith *v.* Miss., 162 *id.* 592, as to affidavit. By § 5 of the act of Aug. 13, 1888, the jurisdiction and rights under the above section are not affected.

[2] Slaughter-House Cases, 16 Wall. 36; United States *v.* Reese, 92 U. S. 214.

[3] Rev. Stat. § 642.

under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or is commenced against any officer of the United States, or other person, on account of any act done under the provisions of title xxvi., 'The Elective Franchise,' or on account of any right, title or authority claimed by such officer or other person under any of the said provisions, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner: said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit, and, together with a certificate of some counsellor at law of some court of record of the state where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the penalties set forth in the petition, and that he believes them to be true, shall be presented to the said circuit court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court; but all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in a state court."[1]

If the suit was commenced in a state court by summons, subpœna, petition or any other process except capias, it is the

[1] Rev. Stat. § 643. By Act of Feb. 8, 1894, ch. 25, 28 Stat. L. 36; 2 Supp. R. S. 171; the part of this section beginning "or is commenced against any officer of the United States," and ending "under any of the said provisions," is repealed. A receiver appointed by a federal court has no right as such to remove a suit in which he is joined as defendant: Shearing *v.* Trumbull, 75 Fed. Rep. 33, disapproving of Lauders *v.* Felton, 73 *id.* 311. By § 5 of the act of Aug. 13, 1888, the jurisdiction and rights in Rev. Stat. §§ 641–3 are not affected by that act.

duty of the clerk of the circuit court to issue a *certiorari* to the state court, requiring it to send to the circuit court the record and proceedings in the cause; and if it was commenced by a capias or other process by which a personal arrest is ordered, it is the duty of the clerk to issue a *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the state court or left at his office by the marshal of the district or his deputy, or by some person duly authorized thereto; and it then becomes the duty of the state court to stay all further proceedings in the cause, and it would have no further jurisdiction of it. If the defendant is in custody on mesne process therein, it is the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with according to law and the order of the circuit court, or, in vacation, of any judge thereof. If it is made to appear to the circuit court that no copy of the record and proceedings therein in the state court can be obtained, it may require the plaintiff to proceed *de novo*, and the parties can then proceed as in actions originally brought in the circuit court. If the plaintiff fails thus to proceed, the circuit court may enter a judgment of *non prosequitur* against him, with costs for the defendant.[1]

Petition Verified; Certificate of Counsel.

§ 186. Under the provisions of this section of the statutes, it is only necessary to set forth in the petition facts showing the nature of the suit or prosecution so as to enable the court to determine whether it falls within the class of cases that may be removed. Where a petitioner for the removal of a prosecution in a state court, where he was held to answer an indictment for murder, stated that at the time the alleged act for which he was indicted was committed, he was, and still continued to be, a deputy collector of internal revenue of the United States; that the act for which he was indicted was done in his own necessary self-defence while engaged in the discharge of the duties of said office, and what was done in the premises was done under and by right of said office; that it was his duty as such officer to seize illicit distilleries and the apparatus used for the illicit and

[1] Rev. Stat. § 643. This statute was held to be constitutional in Tennessee *v.* Davis, 100 U. S. 725. See Virginia *v.* Paul, 148 *id.* 107.

unlawful distillation of spirits, and that while so engaged in enforcing his duty and the law, he was assaulted and fired upon by a number of armed men, and in defence of his life he returned the fire, which was the offence mentioned in the indictment; it was held that this was a sufficient statement of the nature of the case to require a removal, and that the circuit court to which it was removed had jurisdiction to try the case.[1]

If the cause is a civil suit against any of the persons named in the statute, the petition should show this fact and the ground upon which the right of removal is based, as provided by the statute.[2]

It has been held that the post-office laws of the United States are revenue laws within the meaning of the statute providing for the removal of causes against an officer for an act done under the revenue laws of the United States. And if a suit is brought in a state court against a postmaster for a wrongful refusal to deliver a letter the latter would, under the provisions of section 643, be entitled to a removal of the same to the proper circuit court.[3] So, an action brought in a state court against a United States collector of customs to recover damages for alleged slanderous words, spoken while he was in the discharge of his duty and relating to it, is removable.[4] But a suit against a commissioner of a circuit court of the United States, to recover back money alleged to have been illegally exacted of the plaintiff, or a suit against an assistant treasurer of the United States to recover the value of bonds alleged to be unlawfully detained by him, is not a suit against an officer appointed under or acting by authority of any revenue law of the United States, and is not removable from a state court on that ground.[5]

Process of Attachment, Injunction, etc., not Affected by Removal.

§ 187. The act provides: "That when any suit shall be removed from a state court to a circuit court of the United States,

[1] Tennessee *v.* Davis, 100 U. S. 257. See also City of Philadelphia *v.* The Collector, 5 Wall. 720; Hornthall *v.* The Collector, 9 *id.* 560.

[2] Branches *v.* Schell, 4 Blatch. 257.

[3] Warner *v.* Fowler, 4 Blatch. 311; United States *v.* Bromley, 12 How. 88.

[4] Buttner *v.* Miller, 1 Woods (C.C.) 620.

[5] Benchley *v.* Gilbert, 8 Blatch. 147; Victor *v.* Cisco, 5 *id.* 128. See also Payton *v.* Bliss, 1 Woolw. (C.C.) 170.

any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered in the court in which such suit had been commenced; and all bonds, undertakings or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding such removal; and all injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."[1]

Under this provision the circuit court takes the suit precisely in the state and condition it was in when sent from the state court, and any action of the state court, or record made by it, will be regarded the same as though the suit had been originally commenced in the circuit court, and the same action and record there made.[2] The proceedings of the state court are in no particular vacated by the removal, and matters disposed of by it cannot be reconsidered by the circuit court, the judgment of the state court being conclusive as to them.[3]

[1] Act of March 3, 1875, § 4. This provision would seem to repeal, by implication, section 646 of the Revised Statutes.

[2] Section 6 of the act of 1875 provides: "That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal." This would prevent any reconsideration of any question passed upon by the state court. And the jurisdiction of the circuit court is no wider than that of the state court in which the suit was commenced; therefore it cannot, on removal, enforce the provisions of the interstate commerce act: Swift *v.* Phila. & R. R. Co., 58 Fed. Rep. 858.

[3] Duncan *v.* Grigan, 101 U. S. 810. Under the act of 1866 it was held that injunctions were not within the saving clause of the act, and were *ipso facto* dissolved on removal: Hatch *v.* Chicago, etc., R. Co., 6 Blatch. 105. The fourth section of the act of 1875, however, expressly provides that they, as well as all orders and other proceedings, shall remain in full force. So it was held that a motion to dissolve an attachment might be made after removal, although the same motion had been passed upon by the state court: Garden City Man. Co. *v.* Smith, 1 Dill. 305. See also Carrington *v.* Florida R. Co., 9 Blatch. 467, as to proper practice in the circuit court on motions to dissolve injunctions. The federal

When a Suit may be Dismissed or Remanded.

§ 188. The act of 1875 provides that the circuit court may, in case of the removal of a suit thereto from a state court, dismiss or remand the suit to the state court. Section 5 of that act provides: "That if in any suit commenced in the circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after said suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the state court shall be reviewable by the Supreme Court, on writ of error or appeal, as the case may be."[1]

By the act of 1888 it is provided that "at any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said state court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of

court has no jurisdiction to construe the proceedings of a state court and correct a supposed mistake in a description of land covered by such proceedings: Nautahala M. & T. Co. *v.* Thomas, 76 Fed Rep. 59. But a circuit court may vacate the judgment of a state court on the ground of fraud: Davenport *v.* Moore, 74 *id.* 945.

[1] A cause may be remanded prior to the beginning of the term at which the removing defendants are required to file the transcript in the federal court, when the party moving to remand gives proper notice and files the transcript himself: Thompson *v.* Chic., St. P. & K. C. R. Co., 60 Fed. Rep. 773, following Delbanco *v.* Singletary, 40 *id.* 177; Mills *v.* Newell, 41 *id.* 529, and disapproving of Kan. City & T. R. Co. *v.* Interstate Lumber Co., 36 *id.* 9.

said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto."[1] It is also provided that "whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding shall be allowed." The last paragraph of section 5 of the act of 1875 is expressly repealed.[2]

If it is manifest from the pleadings in a suit originally brought in a circuit court, or from the petition for removal thereto from a state court, that, either for want of proper subject-matter, or want of proper parties, or want of proper citizenship of the parties, to confer jurisdiction, the circuit court has no jurisdiction of the cause, it could, without request, dismiss or remand it as the case might require.[3] But the usual practice is to call the attention of the court to these defects by demurrer or motion, as the case may require. When a suit is originally instituted in the circuit court, or brought there from a state court, it is always a proper subject of inquiry, whether the court has or can take jurisdiction.[4]

If the petition and bond for the removal are regular and suffi-

[1] The dismissal of a petition for removal on the ground of prejudice stands on the same ground as an order of remand and is not a final judgment from which a writ of error will lie: Patten *v.* Cilley, 62 Fed. Rep. 497.

[2] See Chic., St. P., M. & O. R Co. *v.* Roberts, 141 U S. 690; McLish *v.* Roff, *Ibid.* 661; Tripp *v.* Santa Rosa St. R. Co., 144 *id.* 126. The action of a circuit court in remanding a cause is not reviewable in the Supreme Court on writ of error to the judgment of the state court, nor by any direct proceeding: Mo. Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556. Nor is it reviewable in the state court: Tilley *v.* Cobb, 56 Minn. 295.

[3] See State *v.* Tolleston Club, 53 Fed. Rep. 18; Southwestern Telgr. & T. Co. *v.* Robinson, 2 U. S. App. 148; Arapahoe Bk. *v.* Bradley, 36 *id.* 519.

[4] Railroad Company *v.* McKinley, 99 U. S. 147. If the state court had full jurisdiction in equity of a suit removed on the ground of diverse citizenship and it appears that the circuit court has no jurisdiction, the proper course is to remand, not to dismiss for want of jurisdiction: Cates *v.* Allen, 149 U. S. 451.

cient on their face, then the state court has no further jurisdiction, and it has no discretion in the matter.[1]

If a motion is made to remand the suit to the state court, this admits the averments of the petition for the removal, like a demurrer to a pleading; and if in either case these do not show the jurisdiction of the court, the cause should be remanded or dismissed.[2] And, as we have noticed, if the bond is manifestly defective, as where no sum for the penalty is inserted in it, this would be ground for remanding the cause to the state court from whence it came.[3]

If there appears to be no defect in the papers, and they conform to the requirements of the statute, issue may be taken in the circuit court on the facts stated in the petition as the ground for the removal, and the jurisdiction of the court would then be determined on a final hearing.[4] After a remand a second petition for a removal on the same ground is not allowed.[5]

When a Copy of the Record Should be Filed; Refusal of the Clerk to Furnish it; When a Writ of Certiorari Will Issue.

§ 189. Ample provision is made to enable a party entitled thereto to procure a copy of the record on the removal of a cause, and to punish the clerk of a state court who shall refuse to furnish one on a proper application made therefor. Section 7 of the act of March 3, 1875, provides: "That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the state court for its removal, then he or they who apply to

[1] Fisk *v.* Union Pac. R. Co., 6 Blatch. 362; Hatch *v.* Chicago R. I. and P. R. Co., *Ibid.* 105; Railroad Co. *v.* Ramsey, 22 Wall. 322; Insurance Co. *v.* Dunn, 19 *id.* 214; Akerly *v.* Vilas, 2 Biss. 110; Kanouse *v.* Martin, 15 How. 198; Osgood *v.* Chicago and C. R. Co., 6 Biss. 330; Winslow *v.* Collins, 110 N. C. 119.

[2] Buttner *v.* Miller, 1 Woods (C. C.) 620; Dennistoun *v.* Draper, 5 Blatch. 336; Heath *v.* Austin, 12 *id.* 320; Galvin *v.* Boutwell, 9 *id.* 470; Wood *v.* Matthews, 2 *id.* 370; Osgood *v.* Chicago, etc., R. Co., 6 Biss. 330.

[3] Burdick *v.* Hale, 7 Biss. 96.

[4] Field *v.* Lownsdale, 1 Deady 288; Fisk *v.* Union Pac. R. Co., 8 Blatch. 243; Heath *v.* Austin, 12 *id.* 320.

[5] Nichols *v.* Stevens, 123 Mo. 96; Smith *v.* Travelers' Ins. Co., 73 Fed. Rep. 513.

remove the same shall have twenty days from such application to file said copy of record in said circuit court and enter an appearance therein, and if done within said twenty days, said filing and appearance shall be taken to satisfy the said bond in that behalf; that if the clerk of the state court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same a copy of the record therein, after a tender of the legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and on conviction thereof in the circuit court of the United States to which said action or proceeding was removed, shall be punished by imprisonment not more than one year, or by a fine not exceeding $1000, or both in the discretion of the court. And the circuit court to which any cause shall be removable under this act shall have power to issue a writ of *certiorari* to said state court, commanding said state court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law; and if it shall be impossible for the parties or persons removing any cause under this act, or complying with its provisions for the removal thereof, to obtain such copy, for the reason that the clerk of the state court refuses to furnish a copy on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecution in any such action or proceeding to enforce forfeiture or recover the penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine, and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said circuit court shall require the other party to plead, and said action or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo*, and the bond given, conditioned as aforesaid, shall be discharged so far as it requires a copy of the record to be filed as aforesaid."

Issues of Fact, when Tried by a Jury: when by the Court.

§ 190. The trial of issues of fact in the circuit courts is required to be by jury, except in cases in equity and of admiralty

and maritime jurisdiction, and in cases of a civil nature where the parties or their attorneys file a stipulation in writing with the clerk of the court, waiving a jury, in which case the suit may be tried by the court, and the finding of the court upon the facts, which may be either general or special, has the same effect as the verdict of a jury.[1] But under former statutes on the subject, parties, by consent, could waive the trial of issues of fact in civil cases by a jury, in the circuit and district courts of the United States, and submit both the law and the facts to the court, in conformity with the practice of the courts of the state where the trial was had.[2] When the record showed that an issue was "called for trial by the court, the jury having been waived in writing," the Supreme Court held this conclusive that the requisite agreement had been made, in the absence of anything to the contrary.[3]

No review in the Supreme Court or Circuit Court of Appeals can be had upon writ of error in such a case, unless there is a special finding from the evidence of ultimate facts by the court. If the facts are found by the court, to which exception is taken and judgment has been rendered upon them, the question for the Supreme Court or Circuit Court of Appeals on error would be, whether the facts found were sufficient to support the judgment.[4] Section 700 provides that when such

[1] Rev. Stat. §§ 648, 649, 700. In cases of admiralty and maritime jurisdiction, on the instance side of the court, the court should find and state the facts and conclusions of law separately: act of February 16, 1875, § 1. Section 649 was not repealed by the act of March 3, 1875, ch. 137, § 3; 18 Stat. L. 471: Phillips *v.* Moore, 100 U. S. 208.

[2] 13 U. S. Stat. 501 (1845); Guild *v.* Frontin, 18 How. 135. See also Suydam *v.* Williamson, 20 *id.* 432; Campbell *v.* Boyreau, 21 *id.* 223; Saulet *v.* Shepherd, 4 Wall. 502; Silsby *v.* Fort, 14 How. 219.

[3] Fleitas *v.* Cockrem, 101 U. S. 301. The written stipulation waiving a jury must be affirmatively shown in the record: Branch *v.* Tex. Lumber Mfg. Co., 2 U. S. App. 623. And see Abraham *v.* Levy, 30 *id.* 713.

[4] Jennisons *v.* Leonard, 21 Wall. 302; Dennistoun *v.* Stewart, 18 How. 565; United States *v.* City Bank, 19 *id.* 385. See also Suydam *v.* Williamson, 20 *id.* 432; Basset *v.* United States, 9 Wall. 38; Copelin *v.* Insurance Co., *Ibid.* 461; Tyng *v.* Grinnell, 92 U. S. 467; Lancaster *v.* Collins, 115 *id.* 222; Waterville *v.* Van Slyke, 116 *id.* 699; Zeckendorf *v.* Johnson, 123 *id.* 617; Bk. of Brit. N. Amer. *v.* Cooper, 137 *id.* 473; St. Paul Plow Works *v.* Starling, 140 *id.* 184; Shipman *v.* Straitsville Min. Co., 158 *id.* 356; Gottlieb *v.* Thatcher, 4 U. S. App. 616; Rush *v.* Newman,

issues are thus tried, "the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment." In case the finding is special, under the provisions of this section it should be of ultimate facts and not a mere report of the evidence in the case. It must be a finding of certain fact propositions which the court believes to be established by the evidence, and not the evidence on which those conclusions rest. If the finding is general, it usually includes mixed questions of law and fact, in which case it is conclusive upon both; and whether general or special, it has the same effect as the verdict of a jury, and consequently is conclusive of the facts found. If there is a general verdict, there can be no review in the appellate court except on a bill of exceptions taken to the ruling of the court on some question of law.[1] But if the verdict is special, the question would be presented by the record whether the facts thus found require a judgment for the plaintiff or defendant, as a

12 *id.* 635; Nat. Bk. of Commerce *v.* First Nat. Bk., 27 *id.* 88; Citizens' Bank of Wichita *v.* Farwell, *Ibid.* 268; Amer. Steam Boiler Ins. Co. *v.* Chic. S. Rfg. Co., 9 *id.* 186; Pac. Postal Telegr. Cable Co. *v.* Fleischner, 29 *id.* 227; Walker *v.* Miller, 19 *id.* 403; Bowden *v.* Burnham, *Ibid.* 448; Thatcher *v.* Gottlieb, *Ibid.* 469; U. S. *v.* Carr, *Ibid.* 679; Kentucky Life and Accdt. Ins. Co., *v.* Hamilton, 22 *id.* 386; Ahlhauser, *v.* Butler, 24 *id.* 95. Where trial was not by a jury nor on an agreed statement of facts, matter raised by a bill of exceptions cannot be considered; an affirmance must be entered: Rogers *v.* U. S., 141 U. S. 548. And see Lehnen *v.* Dickson, 148 *id.* 71, where it is held that no mere recital of the testimony, whether in the opinion of the court or in a bill of exceptions, can be deemed a special finding of facts within the scope of the statutes. Where special findings are irreconcilable with the general verdict, the former control, and if the findings are susceptible of two constructions, the one upholding and the other overthrowing the general verdict, the former will be accepted: Larkin *v.* Upton, 144 *id* 19.

[1] See Searcy Co. *v.* Thompson, 27 U. S. App. 715. The omission of the court to carry one of its conclusions of law into its judgment so as to make it effective will be corrected in the judgment given on writ of error by the appellate court: Kern *v.* H. B. Claflin Co., 13 U. S. App. 707. So where questions of law are reserved, the appellate court, in a proper case, will on writ of error reverse the judgment of the lower court and render the judgment which that court ought to have rendered *non obstante vere-*

matter of law, and the appellate court could review it on the record without a bill of exceptions.[1]

Although the issues of fact in any civil case may be tried and determined by the court without the intervention of a jury, and the court may find upon the facts, either general or special, there is nothing making it the imperative duty of the court to find either way; and if the court chooses to find generally for one side or the other, the losing party has no redress on error or appeal, except for errors in the admission or rejection of evidence, duly excepted to at the time and brought before the appellate court by a bill of exceptions.[2]

To entitle a party to a judgment on the special findings of the court, they should cover all the essential facts, which must exist and concur to constitute a right of recovery.[3]

The provision authorizing a waiver by the parties of trial by jury relates to the circuit courts only, and does not extend to district courts. But we have noticed that the right of trial by jury of issues of fact in the district court might be waived by the parties to a suit.[4]

dicto: Idler's Admrs. *v.* Chataing's Admr., 28 *id.* 332.

[1] Norris *v.* Jackson, 9 Wall. 125; Burr *v.* Des Moines Co., 1 *id.* 99; Insurance Co. *v.* Tweed, 7 *id.* 44; Graham *v.* Bayne, 18 How. 62; Barnes *v.* Williams, 11 Wh. 415; Cucullu *v.* Emmerling, 22 *id.* 83; Coddington *v.* Richardson, 10 *id.* 516. When the record contains special findings of fact, but no bill of exceptions, the errors of law relied upon by a plaintiff in error must be considered and determined upon the findings: Chic., M. & St. P. R. Co. *v.* Hoyt, 149 U. S. 1. See, as to special findings, Miller *v.* Houston City St. R. Co., 13 U. S. App. 57; Mercantile Trust Co. *v.* Wood, 19 *id.* 567. As to findings by a referee, see Shipman *v.* Straitsville Min. Co., 158 U. S. 356. The opinion of the court below is to be treated as part of the record and it, as well as the whole record, may be examined to throw light on the findings: Egan *v.* Hart, 165 *id.* 188.

[2] Dirst *v.* Morris, 14 Wall. 484; Town of Ohio *v.* Marcy, 18 *id.* 552; Insurance Co. *v.* Folsom, *Ibid.* 237; Miller *v.* Insurance Co., 12 *id.* 297; Norris *v.* Jackson, 9 *id.* 125; Copelin *v.* Insurance Co., *Ibid.* 461; Tancred *v.* Christy, 12 M. & W. 323; Bond *v.* Brown, 12 How. 254; Hyde *v.* Boorman, 16 Pet. 176; United States *v.* King, 7 How. 853.

[3] Smith *v.* Sac County, 11 Wall. 139. See also Copelin *v.* Insurance Co., 9 *id.* 461; Insurance Co. *v.* Tweed, 7 *id.* 44; Coddington *v.* Richardson, 10 *id.* 516; Norris *v.* Jackson, 9 *id.* 125; Flanders *v.* Tweed, *Ibid.* 425; Jennisons *v.* Leonard, 21 *id.* 302; Fleitas *v.* Cockrem, 100 U. S. 301; Gilman *v.* Illinois & M. T. Co., 91 *id.* 603.

[4] Blair *v.* Allen, 3 Dill. 101. Under the act of 1845, which also provided

Division of Opinion in Civil and Criminal Causes: Certificate of Division.

§ 191. If there is a difference of opinion between the judges in a civil cause or proceeding in the circuit court, held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, as to any matter or thing to be decided, ruled or ordered by the court, the opinion of the presiding justice or judge will be considered the opinion of the court for the time being.[1]

When a final judgment or decree is entered in any civil suit or proceeding in any circuit court, held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, and on the trial or hearing thereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they disagree must during the same term be stated under the direction of the judges and certified, and such certificate is required to be entered of record.[2]

The Point of Division must be Distinctly Stated.

§ 192. The point upon which the difference occurs should be distinctly stated. If the division of opinion was on a demurrer to an indictment, it was not sufficient to certify that they were

a right of trial by jury of issues of fact in the district courts, it was held that parties might waive a trial by jury, and submit the cause to the court to try it even on an agreed statement of facts: Henderson's Distilled Spirits, 14 Wall. 40. Where a case is tried by the district court without a jury, by agreement of the parties, the circuit court cannot properly consider any of the matters raised by bill of exceptions, nor can the Supreme Court do so. The former can only affirm the judgment of the district court, and the Supreme Court that of the circuit court, the trial not being by jury nor on an agreed statement of facts: Rogers *v.* U. S., 141 U. S. 548.

[1] Rev. Stat. § 650. Whenever any question formerly occurred on the trial or hearing of a criminal proceeding before the court upon which the judges were divided in opinion, the point upon which they disagreed must, on the request of either party or their counsel, have been stated under the direction of the judges, during the same term of court, and certified, under the seal of the court, to the Supreme Court at their next session. Rev. Stat. § 651. Now, however, by the Act of March 3, 1891, ch. 517, the provisions with respect to a certificate of division of opinion in criminal cases have been repealed, and such certificates can no longer be obtained: U. S. *v.* Rider, 163 U. S. 132; U. S. *v.* Hewecker, 17 Sup. Ct. Repr. 18.

[2] Rev. Stat. §§ 652, 693. See Weyauwega *v.* Ayling, 99 U. S. 112.

divided in opinion whether the indictment should or should not be sustained, but the particular point of disagreement should have been stated.[1] The same doctrine applies to demurrers in civil suits[2] and to motions to quash indictments.[3] Nor will the Supreme Court take cognizance of a cause divided into points *pro forma*, and certified without an actual division, or of a division of opinion upon points merely hypothetical.[4]

The Question must Relate to a Point of Law and not of Fact.

§ 193. The question presented must be one of law and not of fact, and not a mixed one of law and fact.[5] And the Supreme Court will dismiss a certified cause for want of jurisdiction, where the question to be determined requires an examination of the evidence in the record.[6] Under the provisions of these sections it has been held necessary to state the particular point of disagreement. It is not sufficient to certify that the judges were divided in opinion as to which party was entitled to a decree;[7] nor that they disagreed *pro forma* in order to take the opinion of this court;[8] but there must be an actual division of opinion upon a question of law duly certified. It must arise during the trial of a cause, and not be a mere incidental or collateral ques-

[1] The United States *v.* Briggs, 5 How. 208; United States *v.* Bailey, 9 Pet. 272.

[2] Havemeyer *v.* Iowa County, 3 Wall. 294; White *v.* Turk, 12 Pet. 238; Adams *v.* Jones, *Ibid.* 213.

[3] United States *v.* Rosenburgh, 7 Wall. 580; Davis *v.* Braden, 10 Pet. 288. But see qualification of doctrine: United States *v.* Chicago, 7 How. 185; Leland *v.* Wilkinson, 10 Pet. 294.

[4] Webster *v.* Cooper, 10 How. 54; *Ex parte* Gordon, 1 Black. 503; United States *v.* Stone, 14 Pet. 524; Luther *v* Borden, 7 How. 1.

[5] Dennistoun *v.* Stewart, 18 How. 565; Kennedy *v.* Bank, 8 *id.* 610; United States *v.* City Bank, 19 *id.* 385; Daniels *v.* Railroad Co., 3 Wall. 250; Silliman *v.* Hudson River & C. Co., 1 Black 582; Graver *v.*Furot, a 162 U. S. 435; Jewell *v.* Knight, 123 *id.* 426; Smith *v.* Craft, *Ibid.* 436; Waterville *v.* Van Slyke, 116 *id.* 699; U. S. *v.* Hall, 131 *id.* 50; Dublin Tp. *v.* Milford Instn., 128 *id.* 510. And see, in general, Balt. & O. R. Co. *v.* Marshall Co. Supervrs., 131 U. S. App xcix; Enfield *v.* Jordan, 119 *id.* 680; State Bank *v.* St. Louis Rail Co., 122 *id.* 21; Chic. Un. Bk. *v.* Kan. City Bk., 136 *id.* 223.

[6] Brobst *v.* Brobst, 4 Wall. 2.

[7] Sadler *v.* Hover, 7 How. 646; Wolf *v.* Usher, 3 Pet. 269; Williamsport Bk. *v.* Knapp, 119 U. S. 357; Fire Ins. Assn. *v.* Wickham, 128 *id.* 426.

[8] Webster *v.* Cooper, 10 How. 54; Nesmith *v.* Sheldon, 6 *id.* 41; United States *v.* Stone, 14 Pet. 524 But see an exception, Jones *v.* Van Zant, 5 How. 224.

tion arising after the judgment or decree.[1] The Supreme Court will not, as a general rule, consider several questions that arose at different stages of the trial and relate to independent points.[2] But where the several questions require an opinion virtually and substantially on one point, and this is shown by the questions presented, and the decision of this one may dispose of all of them, the point will be decided.[3]

The particular points of difference in opinion should be clearly and distinctly presented, and these must not involve matters which rest solely in the discretion of the court below.[4]

But the Supreme Court will entertain jurisdiction even where the division of opinion arises on a preliminary motion, if it involves the merits of the case, and several questions may be certified up if they involve substantially one point and arose at one time.[5] But it is otherwise if they arose at different stages of the trial and relate to independent matters. And the court will not take cognizance of a cause upon a certificate of division where the whole case has been sent up for its opinion.[6]

The Supreme Court can Act only on the Point Presented in the Certificate of Division.

§ 194. The Supreme Court, on a certificate of division of opinion, will only consider the point stated in the certificate. Nothing can come before that court for its consideration in such a case except such single and definite questions as shall have actually arisen in the circuit court and become the subject of disagreement by the judges thereof.[7] If the division of opinion arises

[1] Daniels *v.* Railroad Company, 3 Wall. 250.

[2] United States *v.* Bailey, 9 Pet. 267; Nesmith *v.* Sheldon, 6 How. 43; White *v.* Turk, 12 Pet. 238; United States *v.* Stone, 14 *id.* 524; Saunders *v.* Gould, 4 *id.* 392; Grant *v.* Raymond, 6 *id.* 218.

[3] U. S. *v.* Chicago, 7 How. 185; Leland *v.* Wilkinson, 10 Pet. 294.

[4] Wiggins *v.* Gray, 24 How. 303; Smith *v.* Vaughn, 10 Pet. 366; Packer *v.* Nixon, *Ibid.* 411; Davis *v.* Braden, *Ibid.* 288.

[5] United States *v.* City of Chicago, 7 How. 185; Leland *v.* Wilkinson, 10 Pet. 294.

[6] United States *v.* Bailey, 9 Pet. 267; White *v.* Turk, 12 *id.* 238; United States *v.* Stone, 14 *id.* 524; Saunders *v.* Gould, 4 *id.* 392; Grant *v.* Raymond, 6 *id.* 218; Nesmith *v.* Sheldon, 6 How. 43.

[7] Perkins *v.* Hart, 11 Wh. 237; Kennedy *v.* Georgia State Bk., 8 How. 611; Ogle *v.* Lee, 2 Cr. 33; Ward *v.* Chamberlain, 2 Blatch. 430; Wyman *v.* Southard, 10 Wh. 1; Saunders *v.* Gould, 4 Pet. 392. The determination of the question there

on some question subsequent to the decision of the causes in the circuit court, as where the judges disagree as to the amount of a bond for security to be given by a party on applying for a writ of error,[1] the Supreme Court would have no cognizance of it. And if a certificate of division is certified between the circuit and district judges, when the latter had no authority to sit in the case, this would not give the Supreme Court jurisdiction.[2]

When the Supreme Court is Divided in Opinion.

§ 195. If there are questions duly certified to the Supreme Court on a division of opinion of the judges of a circuit court, and the judges of the Supreme Court are also divided in opinion upon the questions presented, the case will be remitted to the circuit court for such further action as may be required by law and the rules of such court. If there are several questions, and one of them relates to the jurisdiction of the court below, this will be first determined; for if determined against its jurisdiction it would dispose of the others. If a cause is remitted in such a case it is the established rule for the court below to dismiss the cause, and a decree or judgment to that effect should be entered, so that the aggrieved parties may, if they desire, bring the questions to the Supreme Court for review, by appeal or writ of error, as the case may require.[3]

Writ of Error or Appeal in Case of the Death of a Party.

§ 196. Previous to the act of March 3, 1875, there was no adequate remedy, by the representatives of deceased persons by writ of error or appeal, where the deceased was a party to a final judgment or decree rendered in a circuit court, and died before the two years allowed for taking an appeal or bringing a writ

does not affect the right to bring up the case by appeal or writ of error, after the case has been determined in the lower court: Ogle *v.* Lee, 2 Cr. 33; U. S. *v.* Stone, 12 Pet. 524.

[1] Devereux *v.* Marr, 12 Wh. 212; Bank *v.* Green, 6 Pet. 26; U. S. *v.* Daniel, 6 Wh. 548.

[2] United States *v.* Lancaster, 5 Wh. 344.

[3] Silliman *v.* Hudson River Bridge Co., 1 Black 582; Hannaur *v.* Woodruff, 10 Wall. 482. The jurisdiction in such cases is not limited by the amount in controversy: Dow *v.* Johnson, 100 U. S. 158. A division of opinion between a judge, associate justice and a circuit judge may be taken up on a certificate of division of opinion: Insurance Co. *v.* Dunham, 11 Wall. 1; Weyauwega *v.* Ayling, 99 U. S. 112.

of error had expired.[1] But the ninth section of that act provides in such cases as follows: "That whenever either party to a final judgment or decree, which has been or may be rendered in any circuit court, has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive said suit by any formal proceeding aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment, and thereupon may enter an appearance or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree was rendered has died before appeal taken or writ of error brought, notice to his representative shall be given from the Supreme Court, as provided in case of the death of a party after appeal taken or writ of error brought."[2]

[1] Rev. Stat. § 1008. [2] See Sup. Ct. Gen. Rule 15; Circ. Ct. of App. Rule 19.

CHAPTER IX.

CIRCUIT COURTS—PRACTICE AND PROCEDURE IN SUITS AT LAW.

Practice and Procedure in Other than Equity Causes.

§ 197. The practice, pleadings and forms and modes of procedure in civil causes, other than those in equity and admiralty, in the circuit and district courts must conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held.[1] But the jurisdiction of the circuit court is not in any respect extended by the provisions of the section last cited.[2]

The practice, pleadings, forms and modes of proceeding in civil causes embraced in this section are those established by the statutes of the state, and not modes of procedure established by judicial construction of the common law remedies; although the term "practice" embraces rules adopted to facilitate the transaction of business before the court in a proper and orderly manner, as rules of practice when framed by the courts or embodied in statutes. But no construction should be given to a statute of the state relating to practice or procedure, to affect the substantial rights of any suitor secured by act of Congress.[3]

The language of the statute is that the practice, pleadings, forms and modes of proceeding "shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in the courts of record of the state." The words "as near as may be" are quite indefinite, but they were

[1] Rev. Stat. § 914.

[2] Bath County *v.* Amy, 13 Wall. 244; Main *v.* Second Nat. Bank, 6 Biss. 26.

[3] Butler *v.* Young, 5 C. L. N. 146; Sandford *v.* Portsmouth, 6 Cent. L. J. 147; Republic Ins. Co. *v.* Williams, 3 Biss. 370; Nudd *v.* Burrows, 91 U. S. 426; Newcomb *v.* Wood, 97 *id.* 584.

perhaps wisely conceived, as they give the judges some latitude in their construction, and enable them to reject any rule or provision of the state statutes relating to practice or procedure which in their judgment would encumber the proper administration of the law or defeat the ends of justice.[1] It follows from the provision of the statute under consideration that the federal courts have no authority by rules or otherwise to prescribe any mode of practice or procedure in derogation of the provisions of this statute; but where a law of Congress has pointed out a special mode of procedure in relation to the particular subject-matter involved in the proceeding, the federal court cannot adopt the forms and modes of proceeding of the state courts, but should follow the forms and modes pointed out by the act.[2]

The Summons or Other Original Process and Service.

§ 198. The original process issued to the defendant at the commencement of a suit at law should be signed by the clerk and under the seal of the court; and it should substantially comply with the requirements of the state law in reference to original process for the commencement of a suit.[3] Where a state law required that upon every process issued in an action to recover

[1] Indianapolis & St. L. R. R. Co. *v.* Horst, 93 U. S. 291; Sandford *v.* Portsmouth, 6 Cent. L. J. 147. The section has no application to cases in equity or admiralty: Blease *v.* Garlington, 92 U. S. 1.

[2] Easton *v.* Hodges, 7 Biss. 324; Booth *v.* Denike, 65 Fed. Rep. 43; Tex. & Pac. R. Co. *v.* Nelson, 50 *id.* 814. This statute does not apply to appellate proceedings: Ky. Life & Acc. Co. *v.* Hamilton, 63 Fed. Rep. 93. The question whether or not a decree is final is not affected by procedure of state courts: Elser *v.* McCloskey, 70 Fed. Rep. 529. Where the state laws governing condemnation proceedings conflict with the provisions of the federal statutes, they should not be followed in the United States courts: Luxton *v.* Nth. River Bridge Co., 147 U. S. 337. So under Rev. Stat. § 737, the court may proceed to trial without some of the defendants who cannot be found within the district, notwithstanding the state law: Allnut *v.* Lancaster, 76 Fed. Rep. 131. So the mode provided by Act of March 3, 1875, § 8, 1 Supp. R. S. 84, for giving federal courts jurisdiction over absent defendants by publication, must be followed, and not the state practice: Bracken *v.* Un. Pac. R. Co., 56 Fed. Rep. 447. The practice and rules of state courts do not apply to proceedings in the circuit courts to review, in the circuit courts of appeals, the judgments of such circuit courts: Richmond & D. R. Co. *v.* McGee, 8 U. S. App. 86.

[3] Rev. Stat. § 911; Johnson *v.* Healey, 9 Ben. 318; Dwight *v.* Meritt, 4 Fed. Rep. 614.

a penalty or forfeiture there should be endorsed a general reference to the statute under which the penalty or forfeiture is claimed, it was held that this provision should be observed in commencing suits in the federal courts, and that a reference to such statute should be endorsed upon the original process issued by said courts in like cases.[1]

In reference to the service of process it may be said that it is a "mode of proceeding" within the meaning of the section under consideration; that this should be in accordance with the requirement of the state law, and the federal courts can prescribe no other mode of service.[2] The process should run in the name of "The President of the United States," and be directed to the marshal of the district, whose duty it is to execute all lawful precepts directed to him and issued under the authority of the United States.[3] The marshals and their deputies have in each state the same powers in executing the laws and process issued by the courts of the United States as the sheriffs and their deputies have in such state in executing the laws and process of the courts thereof, and a deputy marshal may execute process directed to the marshal.[4]

Original and all other process issued from the federal courts must bear test from the day of such issue, and if the marshal or his deputy is a party in any cause, the writs and precepts therein must be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person thus appointed has authority to execute and return them.[5] But it has been held that subpœnas and ordinary notices stand on different grounds, and that they may be served by any person in conformity with the statutory provisions of the state within which the cause is pending.[6]

In cases where the circuit and district courts have concurrent

[1] Brown *v.* Pond, 5 Fed. Rep. 31; Brown *v.* Pond, *Ibid.* 41. The section last cited does not authorize the commencement of an action by a summons issued in the name of the plaintiff's attorney, although that may be the mode prescribed by the state law: Martin *v.* Criscuola, 10 Blatch. 211.

[2] Perkins *v.* City of Watertown, 5 Biss. 320.

[3] Rev. Stat. § 787.

[4] Schwabacker *v.* Reilly, 2 Dill. 127; James *v.* Jenkins, Hemp. 187; Rev. Stat. § 788.

[5] Rev. Stat. §§ 912, 922; Admiralty Rule 1.

[6] Schwabacker *v.* Reilly, 2 Dill. 127.

jurisdiction with the Court of Claims it is provided by the act of March 3, 1887:[1]

Section 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified, with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and law.

Section 6. That the plaintiff shall cause a copy of his petition, filed under the preceding section, to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney-General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages or other demand or defense whatsoever of the Government in the premises. *Provided*, That should the district attorney neglect or refuse to file the plea, answer, demurrer or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

Jurisdiction Not Acquired by Attachment against a Non-resident.

§ 199. The questions were presented to the Supreme Court whether jurisdiction of the circuit court over a non-resident defendant could be acquired by an attachment of property within

[1] Act of March 3, 1887, ch. 359, 24 Stat. L. 505, 1 Supp. R. S. 560.

the district, and whether, on the dismissal of a cause by the circuit court for the want of jurisdiction in such a case, the Supreme Court ought by mandamus to compel the circuit court to restore the cause and proceed to try it. On a motion to the court for the writ it was refused.[1] Under the provisions of the act of 1789 it was also held that the process of foreign attachment would not confer jurisdiction where the defendant was not an inhabitant of nor served with process within the district where the suit was brought.[2]

Service of Process may be Waived.

§ 200. The service of process against the person of the defendant must be made within the district where the court is held, but if not so served and the defendant is not a resident of the district, he may waive the necessity of such service by a voluntary appearance to the suit without objection.[3] And in such a case the omission to aver on the record that the defendant is an inhabitant of the district or found therein will not be fatal, but the regularity of the service will be presumed.[4]

In what Cases the Several Circuit and District Courts may make their own Rules and Orders.

§ 201. The circuit and district courts may from time to time, in any manner not inconsistent with any law of the United States or any rule prescribed by the Supreme Court of the United States in relation to the practice, procedure and plead-

[1] *Ex parte* Railroad Co., 103 U. S. 794. But see attachments against the property of defaulting or delinquent postmasters, contractors, or other officers, agents or employes of the Post-Office Department, Rev. Stat. § 924.

[2] Hollingsworth *v.* Adams, 2 Dall. 396; Pollard *v.* Dwight, 4 Cr. 421; Fisher *v.* Consequa, 2 Wash. C. C. 382; *Ex parte* Railroad Co., 103 U. S. 794; *ante*, §§ 145, 198; *post*, § 204; Central Trust Co. *v.* Chattanooga R. & C. R. Co., 68 Fed. Rep. 685.

[3] When a defendant sued in a circuit court appears and pleads to the merits he waives the right to challenge thereafter the jurisdiction of the court on the ground that the suit was brought in the wrong district: St. Louis, etc., *v.* McBride, 141 U. S. 127. But a state law making appearance a waiver of the right to object to the jurisdiction does not affect the federal courts: South Pac. Co. *v.* Denton, 146 U. S. 202; Mexican Cent. R. Co. *v.* Pinckney, 149 *id.* 194; Galveston H. & S. A. R. Co. *v.* Gonzales, 151 *id.* 496.

[4] Gracie *v.* Palmer, 8 Wh. 605; Pollard *v.* Dwight, 4 Cr. 421; Toland *v.* Sprague, 12 Pet. 300; Levy *v.* Fitzpatrick, 15 *id.* 167.

ings in equity and admiralty, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the taking and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings in said courts.[1]

Under the section last cited it is not essential that the rules adopted be written rules, but rules recognized by a uniform mode of procedure for a series of years are equally binding and become the rules of the court.[2] No rule of a federal court, however, can exclude competent evidence which is admissible by the general principles of law.[3] But under this provision the circuit courts may adopt rules providing a form for a bill of exceptions, requiring parties to print their briefs, and for making up the trial docket.[4] And a court may suspend its own rules or except a particular operation of them whenever the purposes of justice require it.[5]

Pleading, Practice and Procedure to Conform to State Courts.

§ 202. In reference to the pleadings, practice and procedure in civil causes other than those of equity and admiralty, the language of the statute is as follows: "The practice, pleadings and forms and modes of procedure in civil causes other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."[6]

[1] Rev. Stat. § 918.

[2] Duncan *v.* United States, 7 Pet. 435; Fullerton *v.* Bank, 1 *id.* 604; Koning *v.* Bayard, 2 Paine 251; Russell *v.* Ashley, Hemp. 546; Sellers *v.* Corwin, 5 Ohio 398.

[3] Patterson *v.* Winn, 5 Pet. 233.

[4] Neff *v.* Pennoyer, 3 Saw. 335; The Alice Tainter, 14 Blatch. 225; Pomeroy *v.* State Bank, 1 Wall. 592.

[5] United States *v.* Breitling, 20 How. 252; Russell *v.* McLellan, 3 W. & M. 157; Wallace *v.* Clark, *Ibid.* 359.

[6] Rev. Stat. § 914. The equitable jurisdiction of federal courts is not affected by state statutes making such rights enforceable at law: Indianapolis Water Co. *v.* Amer. Strawboard Co., 53 Fed. Rep. 970; Sheffield

If the original process is substantially in compliance with the state law it will not be set aside, but a summons issued to the defendant at the commencement of the suit must be under the seal of the court and signed by the clerk;[1] and it must be served by a marshal or his deputy, unless he is interested, although the state laws allow such a service to be made by a state officer or by a private person.[2] The service may be made in the mode prescribed by the law of the state.[3] But the jurisdiction of this

Furnace Co. *v.* Witherow, 149 U. S. 574; Lindsay *v.* Shreveport Bank, 156 *id.* 485. Nor can an equitable defence to an action at law be admitted though permitted by state law: Scott *v.* Armstrong, 146 U. S. 499; Davis *v.* Davis, 72 Fed. Rep. 81. A case may be treated as equitable by state courts which federal courts must put on the law docket if it is not within the general equitable jurisdiction: Elliott *v.* Shuler, 50 Fed. Rep. 454; Clapp *v.* Spokane, 53 *id.* 515. But the federal courts may transfer a cause, without abatement, from the equity to the law docket in accordance with state practice: U. S. Bank *v.* Lyon Co., 48 Fed. Rep. 632. Equity procedure is not controlled by state laws: Austin *v.* Riley, 55 *id.* 833; Dodge *v.* Tulley, 144 U. S. 451.

Issue on an answer by a garnishee under state laws is a "civil cause" under this section, although the suit was begun by attachment: Citizens' Bank *v.* Farwell, 56 Fed. Rep. 570.

The law of evidence is generally that of the state: Hinds *v.* Keith, 13 U. S. App. 222; cf. Leggett *v.* Glenn, 4 *id.* 438.

The sufficiency of pleadings must be decided by state law and practice: Rush *v.* Newman, 58 Fed. Rep. 158.

The law of *lis pendens* is a rule of procedure: McCloskey *v.* Barr, 48 Fed. Rep. 130.

The right of set off under state laws is followed in common law cases: Charnley *v.* Sibley, 73 Fed. Rep. 980. State laws granting new trials in ejectment are followed: Smale *v.* Mitchell, 143 U. S. 99; so of laws as to possession of land under color of title: Santee River Cypress Lumber Co. *v.* James, 50 Fed Rep. 360; so of statutes permitting actions to quiet title by persons out of possession: South Pac. R. Co. *v.* Stanley, 49 *id.* 263; so of rules concerning security for costs: Miller *v.* Norfolk & W. R. Co., 47 *id.* 264. State statutes of limitation are adopted: St. Paul, S. & T. F. R. Co. *v.* Sage, 4 U. S. App. 160; Naddo *v.* Bardon, 47 Fed. Rep. 782; Black *v.* Elkhorn Min. Co., *Ibid.* 600; Campbell *v.* Haverhill, 155 U. S. 610; Fearing *v.* Glenn, 73 Fed. Rep. 116. This is so by analogy where federal courts sit as courts of equity: Hayden v. Thompson, 71 *id.* 60.

[1] Johnson *v.* Healy, 9 Ben. 318; Dwight *v.* Merritt, 4 Fed. Rep. 614; Martin *v.* Criscuola, 10 Blatch. 211.

[2] Schwabacker *v.* Reilly, 2 Dill. 127.

[3] Perkins *v.* City of Watertown, 5 Biss. 320; Jewett *v.* Garrett, 47 Fed. Rep. 625; Van Dresser *v.* Oregon Ry. & Nav. Co., 48 *id.* 202.

court cannot be extended over persons who are not rightfully within the reach of such process under the federal statutes.[1]

If the state law allows a suit, jointly, against parties severally liable upon a bond;[2] or permits a joint action against the makers and endorsers of a note;[3] or the principal to sue on a bond made to an agent;[4] or advantage to be taken of the statutes of limitation by demurrer;[5] or an amendment of pleading as a matter of course after a demurrer;[6] the same practice is proper in the federal courts.[7] In fact the practice here must conform to the state law as interpreted by the state courts, as nearly as practicable.[8]

If a state law permits a judgment to be entered on a supersedeas bond, after a return of *nulla bona* on an execution against the debtor, a similar judgment may be entered in the federal

[1] Main *v.* Second Nat. Bk., 6 Biss. 24; Toland *v.* Sprague, 12 Pet. 300; Picquet *v.* Swan, 5 Mas. 35.

[2] United States *v.* Tracy, 8 Ben. 1.

[3] Fullerton *v.* Bank, 1 Pet. 604.

[4] Weed Sewing Mach. Co. *v.* Weeks, 3 Dill. 261.

[5] Chemung Canal Bank *v.* Lowrey, 93 U. S. 72.

[6] Rosenbach *v.* Dreyfuss, 1 Fed. Rep. 391; West *v.* Smith, 101 U. S. 263.

[7] A state statute that in certain actions by the wife, the husband need not be joined, applies to the federal courts: Morning Journal Assn. *v.* Smith, 1 U. S. App. 270. But not in equity suits: Wills *v.* Paul, 51 Fed. Rep. 257.

[8] Republic Ins. Co. *v.* Williams, 3 Biss. 370; Brown *v.* Chesapeake and O. Canal Co., 4 Fed. Rep. 770; Wilcox *v.* Hunt, 13 Pet. 378; Sawin *v.* Kenny, 93 U. S. 289; Taylor *v.* Brigham, 3 Woods 377.

The decisions of the highest court of the state as to local law should be followed: Park Bank *v.* Remsen, 158 U. S. 337; Chisolm *v.* Caines, 67 Fed. Rep. 285; Bardon *v.* Land & R. Imp. Co., 157 U. S. 327; Lambert *v.* Barrett, *Ibid.* 697. See Roberts *v.* North Pac. R. Co., 158 *id.* 1; Balkam *v.* Woodstock Iron Co., 154 *id.* 177; Dibble *v.* Bellingham B. L. Co., 163 *id.* 63; Hancock *v.* Louisv. & N. R. Co., 145 *id.* 409; Dodge *v.* Tulleys, 144 *id.* 451; Appolos *v.* Brady, 4 U. S. App. 209; South Branch Lumber Co. *v.* Ott, 142 U. S. 622; Stutsman Co. *v.* Wallace, *Ibid.* 293; Cross *v.* Allen, 141 *id.* 528; McElvaine *v.* Brush, 142 *id.* 155; Miller *v.* Ammon, 145 *id.* 421; Moses *v.* Lawrence County Bank, 149 *id.* 298; Hallinger *v.* Davis, 146 *id.* 314; Leighton *v.* Young, 10 U. S. App. 298; Bauserman *v.* Blunt, 147 U. S. 647; May *v.* Tenney, 148 *id.* 60; Lewis *v.* Monson, 151 *id.* 545; Barnum *v.* Okolona, 148 *id.* 393; Ankeny *v.* Clark, *Ibid.* 345; Eells *v.* St. Louis, K. & N. R. Co., 52 Fed. Rep. 903; Tod *v.* Ky. Union Land Co., 57 *id.* 47; Quaker City Nat. Bk. *v.* Nolan Co., 59 *id.* 660; Scott *v.* McNeal, 154 U. S. 34; Forsyth *v.* Hammond, 71 Fed. Rep. 443; Balt. & Ohio R. Co. *v.* Baugh, 149 U. S. 369.

courts;[1] and a state law permitting a plaintiff, on motion, to take judgment against a marshal for money collected and not paid over will be adopted in the federal courts, although they cannot enforce a penalty in this summary way against the marshal for the neglect.[2]

Although a state law may provide for the reference of causes, the federal courts cannot adopt this practice without the consent of both parties, as by the federal statutes either party is entitled to a trial by jury in suits at law.[3] But a circuit court may grant a new trial after a report by a referee, when a case has been properly referred to him, if such is the proper practice in the state court.[4] The practice of taking depositions, and to compel the production of books and writings in the possession of an adverse party, is provided for by the federal statutes, and, therefore, is not governed by the state laws.[5] In addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, the depositions or testimony of witnesses may be taken in the mode prescribed by the laws of the state in which the courts are held.[6] A party to an action at law cannot be examined before the trial at the instance of the adverse party, except in cases where it is specially authorized under the federal statutes.[7]

If a state law allows a defendant to appear specially and move to quash an attachment for want of jurisdiction, or a judgment by default to be set aside, or requires notice to be given of a hearing of a demurrer, the practice of the state courts must be

[1] Smith *v.* Gaines, 93 U. S. 341; Hiriat *v.* Ballou, 9 Pet. 156.

[2] Givin *v.* Breedlove, 2 How. 29.

[3] Howe Machine Co. *v.* Edwards, 15 Blatch. 402.

[4] Robinson *v.* Insurance Co., 16 Blatch. 194.

[5] Sage *v.* Tauszky, 6 Cent. L. J. 7; United States *v.* Pings, 4 Fed. Rep. 714; Easton *v.* Hodges, 7 Biss. 324; U. S. *v.* Nat. Lead Co., 75 Fed. Rep. 94; see also Seeley *v.* Kansas City, etc., Co., 71 *id.* 554. The federal courts are not bound by a state law requiring depositions to be used in the trial to be filed one day before trial: Walker *v.* Collins, 59 Fed. Rep. 70. But the practice in relation to the inspection of papers in preparation for trial, as distinguished from papers to be used at the trial, is governed by the practice in the state courts: Frescore *v.* Lancaster, 70 *id.* 337.

[6] Act of March 10, 1892, ch. 14, 2 Supp. R. S. 4, 27 Stat. L. 7.

[7] Easton *v.* Hodges, 7 Biss. 324; Beardsley *v.* Little, 14 Blatch. 102; Corbett *v.* Gibson, 16 *id.* 336.

pursued.[1] But statutes of a state relating merely to the mode of submitting a case to a jury, or requiring a judge to instruct the jury specially upon particular questions of fact involved in the issues in addition to their general verdict, or requiring the judge to reduce his instructions to writing, or that permit the jury to take the instructions and books and papers, which have been used in evidence, with them when they retire to agree on their verdict, or that allow a second trial, or motions for a new trial, are not binding upon the federal courts and have no application to federal practice.[2]

Intervention, Reference, Bail, Imprisonment.

§ 203. If a state law allows a party to intervene for the purpose of claiming property, or for any other purpose, the same practice may be pursued in the federal courts.[3] If, with the consent of both parties, a cause is referred to a referee, a judgment may be entered upon his report, if that would be in accordance with the state law; and if a new trial may be granted by the

[1] Rosenbach *v.* Dreyfuss, 2 Fed. Rep. 23; Republic Ins. Co. *v.* Williams, 3 Biss. 370; Nazro *v.* Cragin, 3 Dill. 474.

[2] Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291; Hankin *v.* Squires, 5 Biss. 186; Nudd *v.* Burrows, 91 U. S. 426; Newcomb *v.* Wood, 97. *id.* 581. See *ante* § 197, note. For a further interpretation of this section see Lamaster *v.* Keeler, 123 U. S. 388; Morgan *v.* Eggers, 127 *id.* 66; Arkansas Smelting Co. *v.* Belden Min. Co., *Ibid.* 387; Amy *v.* Watertown, 130 *id.* 301.

State institutions cannot prohibit judges of the United States courts from charging juries with regard to matters of fact: St. Louis, etc., *v.* Vickers, 122 U. S. 360. A state statute which requires the court upon request of counsel to submit special questions to the jury, and provides that the findings therein shall control the general verdict, is not binding on the federal courts: McElwie *v.* Metropolitan Lumber Co., 69 Fed. Rep. 302. Nor are the federal courts bound by a state law requiring all instructions to a jury to be in writing: Lincoln *v.* Power, 151 U. S. 436. Nor by a statute making errors in written charges in criminal cases reviewable on appeal, although no exception was taken at the trial: St. Clair *v.* U. S., 154 *id.* 134.

In regard to motions for new trials and bills of exceptions the federal courts are independent of any statute or practice prevailing in the courts of the state in which the trial is had: Mo. Pac. R. Co. *v.* Chicago, etc., 132 U. S. 191; Van Stone *v.* Stillwell, etc, 142 *id.* 128; Lowry *v.* Mt. Adams, etc., R. Co., 68 Fed. Rep. 827; Prichard *v.* Budd, 76 *id.* 710; New York & N. E. R. Co. *v.* Hyde, 56 *id.* 188.

[3] Featherman *v*, Louisiana State Sem., 2 Woods 71; Bank *v.* Labilut, 1 *id.* 11.

law of the state it may be granted by the federal courts; but a cause cannot be referred without the consent of both parties where they have a right to a trial by jury.[1]

Special bail, in a cause in the circuit courts, may surrender the debtor in pursuance of the state laws;[2] and a debtor imprisoned under an execution from a federal court is entitled to the privileges of the jail limits as fixed by the law of the state.[3]

Attachments in Common Law Causes.

§ 204. In common law causes, in the circuit and district courts, the plaintiff is entitled to similar remedies by attachment and other process, against the property of the defendant, to those which are provided by the laws of the state in which such court is held for the courts thereof; and such circuit and district courts may from time to time, by general rules, adopt such state laws as may be in force in the states where they are held, in relation to attachments and other process; but similar preliminary affidavits or proofs, and similar security, as required by such state laws, must be first furnished by the party seeking such attachment or other remedy.[4]

Original process from the circuit courts cannot be served on parties beyond the limits of the district where they are issued, so as to confer jurisdiction on the courts; and the provisions of the statute last cited, giving the remedies by attachment and other process against the property of the defendant which are provided by the laws of the state, adopts the state remedy and the form and mode of service of the process, but it does not enlarge the sphere

[1] Howe Machine Co. *v.* Edwards, 15 Blatch. 402; Fourth Nat. Bank *v.* Neyhardt, 13 *id.* 393; Robinson *v.* Insurance Co., 16 *id.* 194. *Ante* § 202.

[2] Beers *v.* Haughton, 9 Pet. 329.

[3] United States *v.* Knight, 14 Pet. 301. And see Stroheim *v.* Deimel, 73 Fed. Rep. 430.

[4] Rev. Stat. § 915. The rules need not be in writing; on appeal it will be presumed that they have been adopted: Citizens' Bank *v.* Farwell, 56 Fed. Rep. 570. For mode of proceeding on attachment in special cases, see Rev. Stat. § 924, *et seq.* Property taken or detained by any officer or other person under authority of any revenue laws is not repleviable: *Ibid.*, § 934. Where by state law equitable interests in real estate are liable to attachment and execution, a bill to aid the same may be brought in a federal court: Laut *v.* Manley, 75 Fed. Rep. 629. Debts due and not due may be included in one attachment, without regard to state practice as to such joinder: Bowden *v.* Burnham, 59 *id.* 752.

of jurisdiction of the court by enabling the plaintiff to compel the appearance of a defendant where he is not amenable to the process of the court *in personam*. The process of foreign attachment served on the property of a non-resident of the district does not confer jurisdiction on the court, unless he is found and served within the district with process *in personam*.[1] This must be done before or at the time of serving the attachment; and it has been held that service after the attachment was levied would not give the court jurisdiction. But a general and voluntary appearance of a defendant in a suit where there is service only of the attachment within the district will give the court jurisdiction.[2]

In case of an attachment, it can only properly issue as a part of and in connection with process to be served upon the defendant *in personam;* and he must be served with the latter process, and have an opportunity to defend himself, or the federal court cannot have jurisdiction of the suit.[3] An attachment cannot afford the means of acquiring jurisdiction over a person who is not an inhabitant of nor found within the state where the suit is brought. The court must acquire jurisdiction over the defendant personally before the plaintiff can have the benefit of this auxiliary remedy by attachment.[4] The attachment must be contemporaneous with the personal service of original process within the district, or follow it, or the federal court can take no cognizance of the cause.[5]

Executions in Common Law Causes.

§ 205. The party recovering a judgment in any common law cause in any circuit or district court is entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are provided in like causes by the laws of the state as they existed at the time of the adoption of the Revised Statutes, or any such laws thereafter enacted which may be adopted by general rules of the circuit or district

[1] Central Tr. Co. *v.* Chattanooga R. H. R. Co., 68 Fed. Rep. 685.

[2] Toland *v.* Sprague, 12 Pet. 300; Picquet *v.* Swan, 5 Mason 35; Chittenden *v.* Darden, 2 Woods 437.

[3] Sadler *v.* Hudson, 2 Curt. 7; Allen *v.* Blunt, 1 Blatch. 480; Day *v.* Newark Man. Co., *Ibid.* 628; Levy *v.* Fitzpatrick, 15 Pet. 171; Manro *v.* Almeida, 10 Wh. 473; Chittenden *v.* Darden, 2 Woods 437.

[4] Nazro *v.* Cragin, 3 Dill. 474; *ante*, § 199.

[5] Chittenden *v.* Darden, 2 Woods 437; *Ex parte* Railroad Co., 103 U. S. 794.

court; and such courts have authority to adopt, from time to time, such state laws, by general rules.[1]

The rights conferred upon parties by virtue of the section last cited are subject to the provisions of the statutes of the state relating to bail, stays and exemptions of property from execution.[2]

The forms of writs, executions and other process of the state courts may undoubtedly be followed in the federal courts by the clerks thereof.[3] But writs of execution issued from the federal courts cannot be controlled, in their general effect and operation, by the provisions of the state law.[4] Thus, if a state law requires the plaintiff to endorse on the execution that certain bank notes will be received in satisfaction of the same, such a provision is not applicable to an execution issuing from the federal courts.[5]

If a mandamus is the proper remedy in the highest state court, to compel the levy of a tax for the satisfaction of a judgment against a municipal corporation, where the judgment creditor has no other means of obtaining satisfaction, this remedy would be appropriate in the federal courts, and a party having such a judgment would be entitled to this remedy in any of those courts held in the state, and an injunction issued by a state court to restrain such a levy would be inoperative against such a mandamus.[6]

A judgment creditor may have the same remedy against a municipal corporation as the state law allows against private individuals in similar cases, even though the state law does not allow that remedy against the corporation.[7] So, if a state law requires a demand and notice in case of an attachment of mortgaged

[1] Rev. Stat. § 916.

[2] Beers *v.* Haughton, 9 Pet. 329; Boyle *v.* Zacherie, 6 *id.* 648; Ross *v.* Duval, 13 *id.* 45; United States *v.* Knight, 14 *id.* 301; Ames *v.* Smith, 16 *id.* 303; Massingill *v.* Downs, 7 How. 760; Wyman *v.* Southard, 10 Wh. 1; Mason *v.* Haile, 12 *id.* 370. See also *Ex parte* Boyd, 105 U. S. 647; Street Ry. Co. *v.* Hart, 114 *id.* 654.

[3] Rev. Stat. § 911; United States *v.* Humphreys, 3 Hughes 201.

[4] United States *v.* Halstead, 10 Wh. 51: Ross *v.* Duval, 13 Pet. 45: Ames *v.* Smith, 16 *id.* 303; Howe *v.* Freeman, 80 Mass. 566. The power to issue writs of *capias ad sat.* is not affected by state laws: U. S. *v.* Arnold, 69 Fed. Rep. 987.

[5] Wayman *v.* Southard, 10 Wh. 1.

[6] United States *v.* Keokuk, 6 Wall. 514; Riggs *v.* Johnson Co., *Ibid.* 166; Wayman *v.* Southard, 10 Wh. 1.

[7] New Orleans *v.* Morris, 3 Woods 115.

property by virtue of judgment, it does not apply to an attachment issued on a judgment in a federal court.[1]

If land is liable to be taken on execution under the laws of the state, it may be taken on execution issued upon a judgment of a federal court, rendered within the state.[2]

Judgment Liens.

§ 206. The judgment of a federal court is a lien from the fact that its effect and the process thereon are the same as on judgments in the state courts; and these liens extend throughout the district in which they are rendered, in all cases and in like circumstances, as judgments of the state courts are liens in more limited districts where they are rendered.[3] In those states where the lien of a judgment of the state courts is limited to the lands or other property within the county where the judgment is rendered, a similar judgment in a federal court, entered in such state, would create a similar lien upon the same property within the territorial limits of the district.[4]

[1] Howe *v.* Freeman, 80 Mas. 566.

[2] United States *v.* Graves, 2 Bock. 379; Bank *v.* Halstead, 10 Wh. 51; Koning *v.* Bayard, 2 Paine 251.

[3] The Act of Aug. 1, 1888, 1 Supp. R. S. 602, makes judgments of United States courts liens on property in states to the same extent as judgments of state courts, provided, that when the laws of a state require a judgment to be recorded, they shall authorize the judgments of the United States courts to be recorded in the same manner.

[4] United States *v.* Humphreys, 3 Hughes 201; Shrew *v.* Jones, 2 McLean 78; United States *v.* Morrison, 4 Pet. 124; Barth *v.* McKeever, 4 Biss. 206; Williams *v.* Benedict, 8 How. 107; Ward *v.* Chamberlain, 2 Black. 430; Koning *v.* Bayard, 2 Paine 251; Massingill *v.* Downs, 7 How. 760; Lombard *v.* Bayard, 1 Wall. Jr. 196; Reed *v.* House, 2 Humph. 576. Judgments and decrees of federal courts cease to be liens within the same period of limitation as the judgments and decrees of state courts: Rev. Stat. § 967.

The manner in which real estate and personal property are to be sold under a decree or order of a federal court, and the previous publication of notice of sale, are regulated by Act of March 3, 1893, ch. 225, 2 Supp. R. S. 135, 27 Stat. L. 751. See Wilson *v.* Northwestern Mut. Life Ins. Co., 65 Fed. Rep. 38. The act is prospective only in its operation: Central Trust Co. *v.* Sheffield & B. C. I. & R. Co., 60 *id.* 9.

CHAPTER X.

CIRCUIT COURTS—PRACTICE AND PROCEDURE IN EQUITY.

Mesne Process and Proceedings in Equity.

§ 207. Section 913 of the Revised Statutes provides: "The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty jurisdiction in the circuit and district courts shall be according to the principles and usages which belong to courts of admiralty and equity, respectively, except when it is otherwise provided by statute or by rule of court made in pursuance thereof; but the same shall be subject to such alteration by the Supreme Court by rules prescribed from time to time, to any circuit or district court, not inconsistent with the laws of the United States."

The Supreme Court has promulgated at various times rules of practice and procedure for the courts of equity of the United States,[1] and given the circuit courts authority (a majority of all the judges thereof, including the Justices of the Supreme Court, the circuit judges and the district judge for the district, concurring therein) to make other rules and regulations for the practice, proceeding and process, mesne and final, in their respective districts, not inconsistent with federal statutes or those prescribed by the Supreme Court, and from time to time to alter and amend the same.[2] These courts may, as courts of equity, establish rules in relation to time and manner of appearing and answering, and may mould them in this respect so as to enlarge the time when it shall appear that the administration of justice requires it.[3] So they may establish the practice relating to the mode of conducting trials, the order of introducing evidence, and the time when it must be introduced, unless these matters shall be regulated

[1] See *post*, Rules in Equity.

[2] Equity Rule 89; Bank of U. S. *v.* White, 8 Pet. 262.

[3] Poultney *v.* City of Lafayette, 12 Pet. 472.

by some fixed general rules by the Supreme Court under some act of Congress, or by some federal statute.[1]

Equity and Admiralty Rules Prescribed by the Supreme Court.

§ 208. The Supreme Court has authority to regulate the practice and procedure in equity and admiralty in the several circuit and district courts of the United States; but they should be consistent with the principles, rules and usages which belong to courts of equity and admiralty respectively. That court has, in reference to chancery practice, provided that, in all cases where the rules prescribed by the Supreme Court or by the circuit courts under the rule last cited do not apply, the practice of the circuit court shall be regulated by the practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held; not as positive rules, but as furnishing just analogies to regulate the practice.[2]

By this rule the practice of the English High Court of Chancery regulates the practice of the circuit courts in the exercise of chancery jurisdiction, subject to the limitations contained therein. The jurisdiction and practice of these courts in equity are the same in all the states, and the rule of decision is the same in all of them. They cannot be regulated by the law or practice of the states; but equitable remedies must be according to the practice of courts of equity in the parent country as contradistinguished from courts of law, subject to such changes as may be made by acts of Congress, or by rules adopted by the courts of the United States in the exercise of the powers delegated to them by such acts.[3]

[1] The Philadelphia, etc., R. Co., *v.* Stimpson, 14 Pet. 448.

[2] Equity Rule 90; Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. 421; Robinson *v.* Campbell, 3 Wh. 212; Story *v.* Livingston, 13 Pet. 359; Wayman *v.* Southard, 10 Wh. 1; Duncan *v.* Durst, 1 How. 301; Pomeroy *v.* Main, 2 Paine 476.

[3] Boyle *v.* Zacherie, 6 Pet. 648; Story *v.* Livingston, 13 *id.* 359; Rhode Island *v.* Massachusetts, 12 *id.* 657; s. c., 15 Pet. 233; Smith *v.* Burnham, 2 Sum. 612. See *ante* notes to § 120.

Power of the Supreme Court to Regulate the Practice in the Circuit and District Courts, in Equity and Admiralty.

§ 209. The power of the Supreme Court to prescribe rules regulating the practice and procedure in equity in the circuit and district courts is expressly conferred by the Revised Statutes, which provide as follows: "The Supreme Court shall have power to prescribe from time to time, in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice to be used in suits in equity or admiralty by the circuit and district courts."[1] But the several circuit and district courts may from time to time, and in a manner not inconsistent with any law of the United States, or any rule prescribed by the Supreme Court under the preceding paragraph, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary and convenient for the advancement of justice and the prevention of delays in proceedings.[2]

These courts can adopt a practice not inconsistent with the rules of practice prescribed by the Supreme Court for them; and they may exercise discretionary powers in those cases where no provision is made by such rules or by acts of Congress.[3] It is not necessary that they should adopt written rules, but these may be established by a uniform course of proceeding for a series of years.[4] Under the provisions of the Revised Statutes, the circuit and district courts may require parties to print their

[1] Rev. Stat. § 917. The rules prescribed by the Supreme Court have the force and effect of statutory provisions, if not inconsistent with the laws of the United States: The Illinois, 1 Brown 13; Gaines *v.* Travis, Abb. Ad. 422; Gray *v.* Chicago, etc., R. Co., 1 Wool. 63; The St. Lawrence, 1 Black. 522.

[2] Rev. Stat. § 918.

[3] Bank of United States *v.* White, 8 Pet. 262.

[4] Duncan *v.* United States, 7 Pet. 435; Koning *v.* Bayard, 2 Paine 251.

briefs;[1] and may adopt a rule for making up the trial docket, and for making the clerk's fee for note of issue a part of the taxable costs.[2] And these courts may suspend their own rules, or except a particular case from their operation, wherever the demands of justice require it.[3]

Affirmation in Lieu of Oath.

§ 210. Where under the general equity rules an oath is or may be required or taken by a party, if he has conscientious scruples against taking an oath he may, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.[4]

The Circuit Courts as Courts of Equity Always Open; When Clerk's Office Open; Rule Days.

§ 211. By virtue of the delegated authority conferred upon the Supreme Court of the United States, it has framed and adopted certain general rules of practice for the courts of equity of the United States, and the first is that "the circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to hearing of all causes upon their merits."[5]

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entertaining and disposing of all motions, rules, orders and other proceedings which are grantable of course and applied for or had by parties or their solicitors, in all causes pending in equity in pursuance of the rules prescribed.[6]

Certain Orders by a Judge in Vacation to have the same Effect as if made by the Circuit Court in Term Time.

§ 212. It is provided by Equity Rule 3 that "any judge of the circuit court, as well in vacation as in term time, may, at chambers or on the rule days of the clerk's office, make and direct all interlocutory orders, rules and other proceedings preparatory to

[1] Neff *v.* Pennoyer, 3 Saw. 335.
[2] The Alice Tainter, 14 Blatch. 225.
[3] United States *v.* Breitling, 20 How. 252; Russell *v.* McLellan, 3 W. & M. 157; Wallace *v.* Clark, *Ibid.* 359.
[4] Equity Rule 91.
[5] Equity Rule 1.
[6] Equity Rule 2.

the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice thereof being first given to the adverse party or his solicitor to appear and show cause to the contrary, at the next rule day thereafter, unless some other time is assigned by the judge for the hearing."

Entry of Orders, Rules and Motions by the Clerk; Rule Days.

§ 213. All motions, rules, orders and other proceedings made and directed at chambers or on rule days at the clerk's office, whether special or of course, must be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed, which book must be open at all hours to the free inspection of the parties in any suit in equity and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in such order-book, touching any and all matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. And where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders or other proceedings not requiring personal service on the parties, in their discretion.[1]

Motions for Process, etc., Granted by the Clerk of Course.

§ 214. It is also provided by a general rule regulating the practice in equity that "all motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso;* for filing exceptions, and for other proceedings in the clerk's office which do not by the rules hereinafter prescribed require any allowance or order of the court or

[1] Equity Rule 4.

of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended or altered or rescinded by any judge of the court, upon any special cause shown."[1]

Motions not Grantable of Course.

§ 215. Equity Rule 6 provides for the practice in case of motions not granted as a matter of course. It is as follows: "All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by the judge of the court, be made on a rule day and entered in the order-book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party or his solicitor shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte* and granted, as if not objected to, or refused, in his discretion."

A motion to produce a paper in the possession of the opposite party, and which it is desired to use in evidence, is not a motion grantable of course, or without notice; but if it is desired to enable the party to plead, it may be granted in the discretion of the court, without notice.[2] Nor is a motion for the appointment of commissioners to take testimony grantable of course. Special motions are not grantable of course, and generally require the allowance of the judge, after notice to the opposite party.[3] But previous notice of a motion for the appointment of a receiver is not necessary, where the counsel for the opposite party is present in court at the time.[4]

Subpœna and Attachment; Proper Mesne Process.

§ 216. Ths process of subpœna constitutes the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided by the general rules in equity, or specially ordered by the circuit court, a writ of attachment, and,

[1] Equity Rule 5. A federal court, in equity, may mould its rules in relation to the time and manner of appearing and answering, so as to prevent them from working injustice: Poultney *v.* Lafayette, 12 Pet. 472.

[2] Bronson *v.* Kinzie, 3 McLean 180.

[3] United States *v.* Parrott, 1 McAll. 447.

[4] McLean *v.* The Lafayette Bank, 3 McLean 503.

if the defendant cannot be found, a writ of sequestration or a writ of assistance, to enforce the delivery of possession, as the case may require, is the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.[1]

Jurisdiction over parties in the circuit or district courts in equity, *in personam*, can only be acquired by the proper service of the process of subpœna within the district where the court is held, or by their voluntary appearance in the suit. If the necessary parties cannot be served within the district, and they do not voluntarily appear, the bill will be dismissed for want of jurisdiction.[2] The statute, as we have seen, does not allow jurisdiction of a suit against a non-resident to be acquired merely by attachment of property of the defendant within the state, so as to authorize a personal judgment, unless personal service upon the defendant is made within the district. The auxiliary remedy by attachment does not afford the means of acquiring jurisdiction.[3] Proceedings in equity against property of a non-resident defendant are, however, authorized in certain cases;[4] but no process of subpœna can issue from the clerk's office in any suit in equity until the bill is filed in his office.[5] We shall hereafter consider the proper form and frame of bills in equity, and what they must contain and what may be omitted in them.

Original Process of Subpœna, when Returnable.

§ 217. Whenever a bill is filed, it is the duty of the clerk to issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which must be returnable into the office of the clerk the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna must be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable, or the bill may

[1] Equity Rule 7.

[2] Herndon *v.* Ridgeway, 17 How. 424. See also Vattier *v.* Hinde, 7 Pet. 252.

[3] Toland *v.* Sprague, 12 Pet. 300; Picquet *v.* Swan, 5 Mason 35; Nazro *v.* Cragin, 3 Dill. 474; *Ex parte* Railroad Co., 103 U. S. 794; Rev. Stat. § 739. See act of August 13, 1888, *ante* § 196.

[4] Act of March 3, 1875, c. 137, § 8.

[5] Equity Rule 11.

be taken as confessed. If there is more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in case of husband and wife defendants, or a joint subpœna may be sued out against all the defendants.[1]

Mode of Serving Process of Subpœna; Alias Subpœnas; Who May Serve.

§ 218. The service of a subpœna must be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.[2] If any subpœna is returned not executed as to any defendant, the plaintiff is entitled to another subpœna, *toties quoties*, against such defendant, if he requires it, until due service is made.[3] The service of all process, mesne and final, shall be by the marshal of the district or his deputy, or by some person specially appointed by the court for that purpose, and not otherwise. In the latter case the person making the service must make affidavit of the same.[4] In the case of service by the marshal or his deputy, a certificate of the fact would be sufficient evidence of the same.

It is the duty of a marshal to serve process as soon as he reasonably can, and he is liable on his bond for any loss occurring through the negligence or unreasonable delay of himself or his deputy in serving the same. The measure of his liability is the extent of the injury caused by the negligence or delay. If the loss of a debt is the direct legal consequence of the failure to serve or of negligent delay, the amount of the debt is the measure of damages; but the mere failure to serve a subpœna does not necessarily infer the loss of the debt, because the plaintiff may sue out another one. The question whether the loss of a debt resulted from the delay or failure of the marshal or his deputy to serve the process is a question of fact depending upon the circumstances, of which a jury must judge.[5] If the deputy

[1] Equity Rule 12.
[2] Equity Rule 13.
[3] Equity Rule, 14.
[4] Equity Rule 15.
[5] The United States *v.* Moore's Adm's, 2 Brock. 317; Kennedy *v.* Brent, 6 Cr. 187.

fails to obey the commands of the writ without legal excuse, or if in the execution thereof he violates the rights of others, the marshal is liable to the party injured.[1]

Docketing Cause; Appearance Day; Entry of Appearance.

§ 219. It is the duty of the clerk, upon the return of a subpœna served and executed upon any defendant, to enter the suit upon his docket as pending in the court, and to state the time of the entry. The defendant must appear on the rule day to which the subpœna is made returnable, provided he has been served with the process twenty days before that day; otherwise his proper appearance day will be the next rule day succeeding. And the appearance of the defendant, either personally or by his solicitor, should be entered by the clerk in the order book on the day thereof.[2]

By the act of March 3, 1875,[3] no civil action could be brought before either the district or circuit court, by any original process or proceeding, in any other district than that whereof the defendant was an inhabitant or in which he should be found at the time of service of such process or commencing such proceedings, except in some special cases, which have been noticed.[4] This provision was altered by the act of August 13, 1888, to "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."[5] The defendant, however, by an appearance in the case without objection to the service, will thereby waive the omission or defect of service, and give the court jurisdiction of the person. Thus, if the defendant in a suit in equity appears and answers the bill, he cannot, on the hearing, object that the bill contains no prayer for process, or that he was not served with process. And a general appearance, personally or by

[1] Insurance Co. *v.* Adams, 9 Pet. 573.

[2] Equity Rules 16, 17.

[3] Act of March 3, 1875, §§ 1, 8.

[4] Act of 1875, §§ 1, 8.

[5] § 8 of Act of 1875 still in force. See *supra*.

counsel, cures all antecedent defects or irregularities of process.[1]

The special appearance of a defendant for the purpose of making objection to the want of proper service might not have this effect;[2] but if he appears in person or by counsel and moves to dismiss the bill for want of jurisdiction and also for want of equity, it is a waiver of want of jurisdiction of the person, on account of the defendant's non-residence in the district and want of service therein.[3] But this doctrine does not apply in case of infant defendants, whose appearance, personally or otherwise, would not be a waiver of want of proper service of process.[4]

Bills taken Pro Confesso: when Defaults may be Entered.

§ 220. The defendant is required to file his plea, demurrer or answer to the bill in the office of the clerk, on the rule day next succeeding that of entering his appearance, unless the time is otherwise enlarged by the judge of the court for cause shown upon motion for that purpose. In default thereof, the plaintiff may, at his election, enter an order, as of course, in the order book, that the bill be taken *pro confesso;* and thereupon the cause must be proceeded with *ex parte*, and the matter of the bill may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, is entitled to process of attachment against the defendant to compel an answer, and the defendant cannot, when arrested upon such

[1] Knox *v.* Summers, 3 Cr. 496; Gracie *v.* Palmer, 8 Wh. 699; Carrington *v.* Bents, 1 McLean 167; Segee *v.* Thomas, 3 Blatch. 11; Goodyear *v.* Bowen, *Ibid.* 266. See generally as to manner of service, St. Louis, etc., *v.* McBride, 141 U. S. 127.

[2] In Kauffman *v.* Wootters, 138 U. S. 285, it was held that state legislation forbidding defendant to come into court and challenge validity of service on him in a personal action without submitting to the jurisdiction of the court, but permitting him fully to protect his rights against a judgment rendered without due process of law, does not violate the fourteenth amendment. See also York *v.* Texas, 137 U. S. 15.

[3] Jones *v.* Andrews, 10 Wall. 327. If defendant enters appearance and expressly waives the question of jurisdiction, he cannot afterward object that the court has not jurisdiction because there is an adequate remedy at law: Levi *v.* Evans, 57 Fed. Rep. 677.

[4] Lessee of Nelson *v.* Moon, 3 McLean 319.

process, be discharged therefrom unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill within a period to be fixed by the court or judge, and undertaking to speed the cause.[1]

Decree on Default.

§ 221. When a bill is taken *pro confesso*, the court may proceed to a decree at the next ensuing term, and such decree rendered must be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, for cause shown, upon motion and affidavit of the defendant. But no such motion can be granted except upon payment of costs of the plaintiff in the suit up to that time, or such part thereof as the court may deem reasonable; and unless the defendant shall undertake to file his answer within such time as the court may direct, and submit to such other terms as the court shall direct for the purpose of speeding the cause.[2]

The court cannot render a final decree for want of appearance at the first term after the service of a subpœna, unless another rule day has intervened; and if a decree *pro confesso* is irregularly entered it will be set aside on motion as a matter of course.[3]

Frame of Bills; Introductory Part.

§ 222. The rules framed and promulgated by the Supreme Court for pleading, practice and procedure in the federal courts in equity prescribe to some extent the form and frame of bills and other pleadings, what they must contain, and what may be omitted in the frame of pleadings from the forms of pleadings in use in the High Court of Chancery in England.

Every bill in the introductory part thereof must contain the names, places of abode and citizenship of all the parties, plaintiffs and defendants, by and against whom the suit is brought. This may be in the following form:

"To the judges of the circuit court of the United States for the district of : A. B., of , and a citizen of the state

[1] Equity Rule 18; Pendleton *v.* Evans, 4 Wash. 336.

[2] Equity Rule 19.

[3] O'Hara *v.* MacConnell, 93 U. S. 150; Fellows *v.* Hall & Allen, 3 McLean 281.

of , brings this his bill against C. D., of , and a citizen of the state of , and E. F., of , and a citizen of the state of . And thereupon your orator complains and says that," etc.[1]

It is, however, quite common and convenient to preface this introduction to the bill with the following caption: "Circuit court of the United States for the district of , in the circuit."

What may be Omitted from the Bill.

§ 223. It is provided by rule that the plaintiff shall be at liberty to omit the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiffs; also what is commonly called the charging part of the bill, that is, the part usually setting forth the matters or excuses which the defendant will, it is supposed, set up by way of defence to the bill; also what is commonly called the jurisdiction clause of the bill, that is, that part which sets forth that the acts complained of are contrary to equity, and that the defendant is without any remedy at law.

If these common averments of a bill in chancery are omitted, the bill will not be demurrable therefor. The complainant may also, in the narrative part of his bill, state and avoid by counter averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defence to the case made by the plaintiff for relief.[2]

The Prayer for Relief of the Bill.

§ 224. The prayer of the bill must ask for the special relief to which the plaintiff supposes himself entitled, and must also contain a prayer for general relief; and if an injunction or writ of *ne exeat regno*, or any other special order pending the suit, is required, it must be specifically asked for.[3]

The complainant's bill should give a general statement of the facts of the case, and it should contain sufficient matters of fact

[1] Equity Rule 20. The failure to give places of residence of parties may be corrected by amendment without delay: Harvey *v.* Richmond & M. R. Co., 64 Fed. Rep. 19.

[2] Equity Rule 21; Gage *v.* Kaufman, 133 U. S. 471.

[3] Equity Rule 21.

to maintain his case. The proofs must sustain the allegations; and a party will not be allowed to state one case in his bill or answer and make out a different one by his proof. The *allegata* and *probata* must agree.[1]

It is provided by Equity Rule 94 that "every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."[2]

Under the general prayer for relief, other relief may be granted than that which is particularly prayed for; but it must be consistent with the case made by the bill.[3]

A bill in equity praying for a discovery and an account of profits on account of an infringement of a patent is not demurrable on the ground that the complainant has an adequate remedy at law.[4]

[1] Harrison *v.* Nixon, 9 Pet. 483; Boon *v.* Chiles, 10 *id.* 177; Denham *v.* Railway Co., 1 Bond. (C. C.) 442.

[2] This rule has no technical force in cases removed from the state courts: Evans *v.* Un. Pac. R. Co., 58 Fed. Rep. 497. See also Ranger *v.* Champion Cotton Press Co., 52 *id.* 611.

[3] English *v.* Foxall, 2 Pet. 595; Walden *v.* Bodley, 14 *id.* 156; Hobson *v.* McArthur, 16 *id.* 182; Taylor *v.* Merchants' Fire Ins. Co., 9 How. 390; Wilson *v.* Graham, 4 Wash. 53; Boone *v.* Chiles, 10 Pet. 200; Stevens *v.* Gladding, 17 How. 455; Texas *v.* Hardenberg, 10 Wall. 86; Hayward *v.* National Bank, 96 U. S. 615; Williams *v.* Jackson, 107 *id.* 478; Tyler *v.* Savage, 143 *id.* 79. As to bringing in new claims, and causes of action, and other matters of difference, etc., see Chicago, etc., R. Co. *v.* Denver, etc., R. Co., 143 U. S. 596; Lacassagne *v.* Chapuis, 144 *id.* 119, as to suit at law instead of in equity, purchase pending the suit, dismissing bill without prejudice, etc.; and see Coosaw Mining Co. *v.* South Carolina, *Ibid.* 550, as to the right of a state to sue in equity to prevent illegal interference with its control, etc., of phosphate rock and phosphate deposits in the bed of a navigable river within its territory and the incompleteness of the remedy at law.

[4] Perry *v.* Corning, 7 Blatch, 195.

Parties Beyond the Jurisdiction of the Court.

§ 225. If other parties than those named as defendants in the bill appear to be necessary or proper parties thereto, the bill should aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to other parties. As to persons who are without the jurisdiction of the court, and may be properly made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction of the court.[1]

What the Prayer for Process of Subpœna must Contain.

§ 226. The prayer for process of subpœna must contain the names of all the defendants named in the introductory part of the bill.[2] If any of them are infants under age, or otherwise under guardianship, it should state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction or writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, it is sufficient without repeating the same in the prayer for process.[3]

Signature of Counsel.

§ 227. Bills in chancery should have the signature of counsel annexed to them; and this is considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the bill in the manner in which it is framed.[4] If the bill is not signed by counsel, it is demurrable; but signing on the back of it is sufficient, and if it is demurred to for this defect, it may be amended so as to obviate the objection made by the demurrer.[5]

[1] Equity Rule 22.

[2] Where the prayer does not contain the names of all the defendants the court may dismiss the bill on its own motion: Carlsbad *v.* Tibbetts, 51 Fed. Rep. 852; Goebel *v.* Am. Ry. Supply Co., 55 *id.* 825.

[3] Equity Rule 23.

[4] Equity Rule 24.

[5] Dwight *v.* Humphrey, 3 McLean 104; Roach *v.* Hulings, 5 Cr. (C. C.) 637. If a demurrer to a bill shall be allowed, an amendment may be allowed in the discretion of the court, on such terms as may be deemed reasonable: Equity Rule 35.

Scandal and Impertinence in Bills.

§ 228. It is required that every bill should be expressed in as succinct terms as it reasonably can be, and that it contain no unnecessary recitals of deeds, documents, contracts or other instruments *in haec verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions thereto for this cause, be referred to a master by any judge of the court; and if so found by him to be scandalous or impertinent, the scandalous or impertinent matter may be expunged at the expense of the plaintiff, and he will be required to pay the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. But if the master reports that the bill is not scandalous or impertinent, the plaintiff is entitled to all costs occasioned by the reference.[1]

No general rule can be laid down as to what constitutes multifariousness, scandal or impertinence. Each case must be governed by the circumstances, in regard to which the court or examiner should exercise a sound discretion.[2]

No Order of Reference to a Master, for Scandal or Impertinence, unless Exceptions are taken in Writing.

§ 229. No order can be made by any judge for referring any bill, answer or pleading, or other matter or proceeding depending before the court, for scandal or impertinence, unless exceptions are taken thereto in writing and signed by counsel, describing the particular passages that are considered to be scandalous or impertinent. Such exceptions must be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned unless the party obtaining it shall, without any unnecessary delay, procure the master to examine and report the same on or before the

[1] Equity Rule 26. If exhibits are attached, the bill should contain explicit references to them: Electrolibration Co. *v.* Jackson, 52 Fed. Rep. 773.

[2] Gaines *v.* Chew, 2 How. 619; Oliver *v.* Platt, 3 *id.* 333; McLean *v.* Lafayette Bank, 3 McLean 415; Nourse *v.* Allen, 4 Blatch. 376. And see Brown *v.* Guarantee Trust Co., 128 U. S. 403; U. S. *v.* Am. Bell Tel. Co., *Ibid.* 315, as to general rules touching multifariousness.

next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.[1]

Amendment of Bills, when of Course.

§ 230. The plaintiff is at liberty, as a matter of course and without payment of costs, to amend his bill in any respect, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point, which he may do of course, even after a copy has been taken out of the clerk's office, but before any answer or plea or demurrer to the bill, he must pay to the defendant the costs occasioned thereby, and must without delay furnish him a fair copy thereof, free of expense, with suitable references to the places where the amendments are to be inserted. And if the amendments are numerous he must furnish in like manner to the defendant a copy of the whole bill as amended; and if there be more than one defendant, a copy must be furnished to each defendant affected thereby.[2]

Under the privilege of amending a party is not at liberty to abandon the entire case made by the bill and make a new and different case. Amendments are properly allowable when the bill is found defective in proper parties to it, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case; but not for putting in issue new matter to meet allegations of the answer. Amendments which change the character of the bill or answer so as to make substantially a new case should rarely if ever be admitted, especially after a cause has been set for a hearing.[3] If an amendment is made of course or on leave, as we shall hereafter notice, it should be by a separate bill, and not by interlineation of the original bill.[4] An amendment of the bill may be made by leave

[1] Equity Rule 27; Oliver *v.* Piatt, 3 How. 333; Nelson *v.* Hill, 5 *id.* 127.

[2] Equity Rule 28. Where amended bill was filed, but withdrawn before compliance with this rule, it was held that the case was left as if no amendment had been filed: Sheffield Furnace Co. *v.* Witherow, 149 U. S. 574.

[3] Shields *v.* Barrow, 17 How. 130; Walden *v.* Bodley, 14 Pet. 156; Holmes *v.* Trout, 1 McLean 1.

[4] Pierce & McDonald *v.* West, Ex'r, 3 Wash. 354.

of the circuit court, after the removal of a cause from a state court, by inserting new counts for the same cause of action as that alleged in the original bill.[1]

Amendment of Bill may be made after Answer, Plea or Demurrer.

§ 231. The plaintiff may, even after an answer, plea or demurrer to his bill, but before replication, obtain an order from any judge of the court to amend his bill, upon motion or petition without notice on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof in his discretion may direct.[2] If, however, a replication has been filed, the plaintiff will not be permitted to withdraw it and amend his bill, except upon a special order of a judge of the court, upon motion or petition after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiffs submitting to such other terms as may be imposed by the judge for speeding the cause.[3]

Under the provisions of the rule last cited, a bill may be amended after a hearing and case for relief made out, but not the case made by the bill. Thus, where the original bill was for a specific performance, but did not state the facts and circumstances on which the relief was based with sufficient fullness, and the amended bill embraced the subject-matter and general purpose of the original one, and stated the contract, consideration, promise and acts of part performance with sufficient accuracy and precision, and the proof taken under the original bill entitled the complainants to the relief sought, it was held that the amendment after the hearing should be allowed.[4] But an amendment will not be allowed after replication, where the purpose of it is to bring in a new party who was known to the original plaintiff or his agent at the time the bill was filed.[5]

[1] West *v.* Smith, 101 U. S. 263.

[2] The defendant is entitled to additional time to answer the amended bill; usually same time as for original bill: Nelson *v.* Eaton, 66 Fed. Rep. 376.

[3] Equity Rule 29.

[4] Neale *v.* Neale, 9 Wall. 1.

[5] Ross *v.* Carpenter, 6 McLean 382; Goodyear *v.* Bourn, 3 Blatch. 266. After final decision on merits the court will not permit pleadings to be

Although the ruling on a demurrer to a bill may be erroneous, yet if the plaintiff amends his bill in conformity with the ruling, and the defendant answers the bill as amended, neither party can take advantage of the erroneous ruling.[1]

When Amendments must be Filed after Order of Allowance.

§ 232. If the plaintiff obtains an order to amend, as provided by the rule last cited, he should file his amendments or amended bill, as the case may require, in the office of the clerk, on or before the succeeding rule day. If he fails to do so he must be considered to have abandoned the same, and the cause will proceed as if no application for an amendment had been made.[2]

Demurrers and Pleas; Allowance of.

§ 233. No demurrer or plea is allowed to be filed to any bill unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if it be a plea, that it is true in point of fact.[3]

If the demurrer or plea is not accompanied by the proper certificate of counsel and the required affidavit of the defendant, the proper practice is to move to strike it from the files. If the plaintiff files a demurrer to a plea, and the cause is regularly brought to argument on the question of the sufficiency of it, the want of the certificate and affidavit will be regarded as waived.[4]

amended to meet objections made two months previous to the decision: Claflin *v.* Bennett, 51 Fed. Rep. 693; Blair *v.* Harrison, 57 *id.* 257.

[1] Marshall *v.* Vicksburg, 15 Wall. 146.

[2] Equity Rule 30. As to amendments generally, see Graffan *v.* Burgess, 117 U. S. 180; Richmond *v.* Irons, 121 *id.* 27; Jones *v.* Van Doren, 130 *id.* 684; Chicago, etc., R. Co., *v.* Chicago Third Nat. Bk. 134 *id.* 276.

[3] Equity Rule 31. A demurrer which does not comply with this rule is fatally defective: Sheffield Furnace Co. *v.* Witherow, 149 U. S. 574. It may, however, be regarded as a ground of objection to granting a preliminary injunction prayed for: Preston *v.* Kinley, 72 Fed. Rep. 850.

[4] Goodyear's Adm'rs *v.* Toby, 6 Blatch. 130. If a plea is filed irregularly, the complainant cannot treat it as a nullity and take a decree *pro confesso*. He should, before taking such a decree, obtain an order setting the plea aside or striking it from the files: Ewing *v.* Blight, 3 Wall. Jr. 134.

Demurrer; Plea; Answer.

§ 234. The defendant may at any time before the bill is taken for confessed, or afterwards with leave of the court, demur or plead to the whole bill, or to a part of it, and he may demur to part and plead to part of it, and answer to the residue. But if a bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying fraud and combination, and the facts on which the charge is founded.[1]

A defendant may meet a plaintiff's bill by several modes of defence. He may demur, plead or answer to the whole or to different parts of the bill. But a demurrer to the whole bill will not be sustained if any part of the bill is good and entitles the plaintiff to relief.[2]

Matters in abatement and relating to the jurisdiction of the court are preliminary in their nature, and must be taken advantage of by a plea, and cannot be by a general answer which admits the right and capacity of the plaintiff to sue.[3]

The office of a demurrer to a bill is to present the question of the right to maintain it, admitting all its allegations to be true. The court will not therefore examine, *aliunde*, what facts might or might not defeat it, for this is the office of an answer or plea.[4]

The office of a plea is to furnish some fact or facts not shown by the bill, but which, if stated therein, would have made the bill demurrable.

Argument on Demurrer or Plea.

§ 235. The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea.[5] If, upon issue taken,

[1] Equity Rule 32. But the confederacy clause may be omitted: Equity Rule 21. When two demurrers virtually the same are filed, one within the time required by the court, the other subsequent to that time, it is within the court's discretion to permit the filing of the second demurrer: Harvey *v.* Richm. & M. R. Co., 64 Fed. Rep. 19.

[2] Livingstone *v.* Story, 9 Pet. 632; Heath *v.* Erie R. Co., 8 Blatch. 347; Drexel *v.* Berney, 122 U. S. 241; Stewart *v.* Masterson, 131 *id.* 151. An objection to a bill for multifariousness cannot be taken merely at a hearing, but must be specifically stated by demurrer or other pleading: Ranger *v.* Champion Cotton Press Co., 52 Fed. Rep. 611.

[3] Livingstone *v.* Story, 1 Pet. 351.

[4] Ocean Ins. Co. *v.* Fields, 2 Story 59.

[5] Where a plea in bar is supported

the facts stated in a plea be determined for the defendant, they avail him so far as in law they ought to avail him.[1] If a bill in chancery avers that the defendant is a citizen of a state other than that of which the plaintiff is a citizen, the issue therein should be raised by a plea to the jurisdiction of the court.[2] The complainant should either demur to a plea and set it down for argument, in which case he admits the facts stated in the plea, but denies their legal sufficiency to prevent the relief claimed in the bill, or he should reply to the plea, denying the truth of the statements of the same, or some of them, in which case he admits that if the controverted facts are true, then they are sufficient in law to bar a recovery. And if they are proved to be true, the bill should be dismissed.[3]

Costs Where the Demurrer or Plea is Overruled.

§ 236. If upon a hearing of a demurrer or plea it is overruled, the plaintiff is entitled to his costs up to that time, unless the court is satisfied that the defendant had good ground to interpose the same, and that it was not interposed vexatiously or for delay. Upon the overruling of a demurrer or plea, the defendant must be assigned to answer the bill, or so much thereof as is covered by the demurrer, the next succeeding rule day, or at such other period as, in the opinion of the court, it can be done consistently with justice and the rights of the defendant, in default of which the bill will be taken as confessed and the matter proceeded in and decreed accordingly.[4] If a decree *pro confesso*

by an answer, if the plaintiff excepts to the answer he admits the validity of the plea: Hatch *v.* Bancroft-Thompson Co., 67 Fed. Rep. 802.

[1] Equity Rule 33; Horn *v.* Detroit Dry Dock Co., 150 U. S. 610, 625. See Pearce *v.* Rice, 142 *id.* 28, 42; Gillette *v.* Doheny, 65 Fed. Rep. 715. See also for construction of equity rules 38 and 39 *Ibid*; Holton *v.* Guinn, 65 *id.* 450; Hatch *v.* Bancroft-Thompson Co., 67 *id.* 802. The complainant may avoid the allegations of the plea by proof of other facts: Elgin W. P. & P. Co. *v.* Nichols, 65 Fed. Rep. 215. If the court below sustains the sufficiency of the defendant's plea, the plaintiff may ask the Supreme Court to review the decree: Green *v.* Boyne, 158 U. S. 478.

[2] Wickliffe *v.* Owings, 17 How. 47.

[3] Rhode Island *v.* Massachusetts, 14 Pet. 210. In United States *v.* Dalles Military Road Co., 140 U. S. 599, it was held that a party after demurring to a plea and the demurrer being sustained, should have been permitted to reply to the plea, and the case was reversed because this was not allowed. See Pearce *v.* Rice, 142 *id.* 28.

[4] Equity Rule 34; Bank of U. S. *v.* White, 8 Pet. 262.

is taken before the time given for answer, it is, of course, irregular and may be set aside on motion.[1] If a demurrer to a bill is interposed by one of several defendants and overruled, and there is a failure of all the defendants to answer within the required time, the bill will be taken as confessed as to all of them.[2]

Amendment of a Bill on Allowance of Demurrer; Costs.

§ 237. If the demurrer or plea is sustained, the court may allow the plaintiff to amend the bill upon such terms as it shall deem reasonable; but the defendant is entitled to his costs. The allowance of an amendment is in the discretion of the court, and an order refusing leave to amend is not subject to review in the Supreme Court.[3]

A demurrer or plea cannot be held bad and overruled upon argument merely because it does not cover so much of the bill as it might have done.[4] It may cover a part only of the bill, and the defendant may answer the balance.

Effect of Failure to Reply.

§ 238. If the plaintiff does not reply to any plea, or set down any plea or demurrer for argument on the rule day when the same is filed, or on the next rule day, he is deemed to admit the truth and sufficiency thereof, and his bill must be dismissed of course, unless the judge shall allow him further time for that purpose.[5] A replication, as we have noticed, is an admission of the sufficiency of the plea, and all the defendant has to do is to prove it true.[6]

Effect of the Answer as Evidence.

§ 239. The general rule in chancery practice is that averments of the answer of the defendant uncontradicted on the trial are conclusive evidence in his favor;[7] and if it admits averments

[1] Fellows *v.* Hull, 3 McLean 487.

[2] Suydam *v.* Beals, 4 McLean, 12.

[3] Equity Rule 35; National Bank *v.* Carpenter, 101 U. S. 567; Hunt *v.* Louis, 2 Mason 342.

[4] Ferguson *v.* O'Harra, 1 Pet. (C. C.) 498; Equity Rules 36, 37.

[5] Where all days in term time are treated as rule days, failure to set demurrer down for argument on rule day when filed or on next rule day is not ground for dismissing the bill: Electrolibration Co. *v.* Jackson, 52 Fed. Rep. 773.

[6] Equity Rule 38; Hughes *v.* Blake, 6 Wh. 453; Poultney *v.* La Fayette, 3 How. 81.

[7] Lenox *v.* Pront, 3 Wh. 520; Clark *v.* White, 12 Pet. 178; Randall *v.* Phillips, 3 Mason 378; U. S. *v.* Trans-

of the bill, but insists upon matters by way of avoidance of such facts, the plaintiff need not prove the facts admitted, and the burden is on the defendant to prove the matters in avoidance. So the general rule in chancery is that, if the facts charged in a bill as the ground for a decree are positively denied by the answer, the answer in this respect is equivalent to the adverse evidence of at least one witness; and if the averments of the bill which are thus denied are sustained by only one witness, the court would ordinarily be compelled to dismiss the bill. But if the averments thus contradicted are supported by one witness, corroborated by facts and circumstances established by the proof, it may be sufficient to outweigh the answer, unless the latter is also supported by other proof.[1]

The matters of the bill not denied by the answer, or admitted, are considered as true; but, as a general rule, the answer of one defendant cannot be used as evidence against his co-defendant; nor can the admissions in the answer of an agent be evidence against his principal; nor can the admissions of an agent, *in pais*, be evidence against his principal unless they were a part of the *res gesta*.[2] If, however, one defendant claims, as a defence, rights or interests derived from or through his co-defendant, the answer to the latter may be proper evidence against the former.[3]

The general rule above stated, relating to the answer as evidence, has been somewhat limited and modified by a general rule promulgated by the Supreme Court, as we shall hereafter notice.[4]

Interrogating Part of the Bill; Answer to.

§ 240. It is not essential to interrogate the defendant specially and particularly upon any statement of the bill, unless the complainant desires to do so to obtain a discovery. If, however, he inserts interrogatories in the interrogating part of it, they should

Missouri Freight Assn., 58 Fed. Rep. 58; Lake Erie & W R. Co. *v.* Indianap. Nat. Bk., 65 *id.* 690. See also U. S. *v.* Ferguson, 54 *id.* 28.

[1] Union Bank *v.* Geary, 5 Pet. 98; Carpenter *v.* The Providence Ins. Co., 4 How. 185; Higbee *v.* Hopkins, 1 Wash. 230.

[2] Leeds *v.* Marine Ins. Co., 2 Wh. 380; Clark's Ex'r *v.* Van Reimsdyk, 9 Cr. 153.

[3] Field *v.* Holland, 6 Cr. 8; Osborne *v.* The President, Directors, etc., 9 *id* 738.

[4] Amended Equity Rule 41, *post.*

be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and those interrogatories which each defendant is required to answer, where there are more than one, must be specified in a note at the foot of the bill to this effect: "The defendant, A. B., is required to answer the interrogatories numbered respectively 1, 2, 3," etc. "The defendant, C. D., is required to answer the interrogatories numbered respectively," etc.[1]

When the Answer is Not Evidence.

§ 241. We have noticed the general rule in chancery in reference to the answer as evidence. But this has been restricted in certain cases by the rules of practice in equity prescribed by the Supreme Court. An amendment to Equity Rule No. 41 (December term, 1871) provides: "If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such parts thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause is set down for hearing on the bill and answer only; but may, nevertheless, be used as an affidavit with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in a cause."[2] But this does not prevent the defendant from becoming a witness in his own behalf, under section 858 of the Revised Statutes, which provides that no witness shall be excluded in any civil action because he is a party or interested in the issue tried, except in certain cases.

Note at the Foot of the Bill Treated as a Part of the Bill.

§ 242. By the provisions of the rule last referred to, the complainant may only require an answer under oath to certain interrogatories to be specified in a note at the foot of the bill. This note is considered and treated as a part of the bill, and any

[1] Equity Rule 40, as amended, Dec. term, 1850, 10 How. 5; Equity Rule 41.

[2] U. S. *v.* Workingmen's, etc., Council, 54 Fed. Rep. 994. When complainant neither demands nor waives answer under oath, the answer under oath is evidence in defendant's favor and conclusive if not contradicted: Dravo *v.* Fabel, 132 U. S. 487; Conley *v.* Nailor, 118 *id.* 127.

alteration in or addition to such note after the bill is filed will be considered and treated as an amendment of the bill.[1] The words preceding the interrogating part of a bill should be in the form or to the effect following: "To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, etc.

"2. Whether, etc."[2]

Interrogatories a Defendant May Decline to Answer.

§ 243. A defendant may, by answer, decline answering any interrogatory, or part of an interrogatory, from the answering of which he might have protected himself by demurrer; and he is at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.[3]

Replication to Answer.

§ 244. No special replication to any answer is allowed to be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may obtain leave to amend the same with or without the payment of costs, as the court or a judge thereof may in his discretion direct.[4] Special replications can no longer be used in chancery. If, from the nature of the answer, it becomes necessary to prove other matters than those contained in the bill, the proper practice would be to amend the bill in this respect, and insert the proper and necessary averment therein. Thus if a suit is brought in equity

[1] Equity Rule 42.

[2] Equity Rule 43.

[3] Equity Rule 44.

[4] Equity Rule 45; Duponti *v.* Massy, 4 Wash. 128. This rule "means, at most, that a general replication is always sufficient to put in issue every material allegation of an answer or amended answer, unless the rules of pleading imperatively require an amendment of the bill:" Southern Pac. R. Co. *v.* U. S., 18 Sup. Ct. Repr. 18.

to restrain the use of a machine on the ground of an infringement of a patent thereon, and the defendant in his answer sets up a license therefor, the plaintiff cannot prove an abandonment of the license under a special replication, but should amend his bill and allege such abandonment.[1] So special facts in excuse for not bringing suit within the period prescribed by the Statute of Limitations should be set forth in the bill, such as coverture, minority or residence abroad. If these matters are omitted, the bill may be amended in this respect after answer, on leave of court, but they cannot be set up by special replication.[2] Although amendments of bills, after answer, cannot be made without leave of the court, objections to amendments without leave cannot be made for the first time in the appellate court.[3]

In case of an amendment of a bill after an answer filed, the defendant is required to put in a new or supplemental answer on or before the next succeeding rule day, which would be the first Monday of the next succeeding month after that on which the amendment or amended bill is filed, unless the time is extended or it is otherwise ordered by the court. And in case of the default of the defendant so to do, like proceedings may be had as in case of omission of a defendant to put in answer to an original bill.[4]

Parties to Bills; Absent Parties.

§ 245. It is provided by Rule 47 in equity that "in all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent party."

If the cause can be fully and finally decided between the parties litigant without bringing in others who might also be made parties, and the latter cannot be reached by the process of

[1] Wilson *v.* Stolly, 4 McLean 275.
[2] Taylor *v.* Benham, 5 How. 233.
[3] Clements *v.* Moone, 6 Wall. 299.
[4] Equity Rule 46.

the court, as where they cannot be served with process within the district, such parties may be dispensed with, and the cause be determined between the parties before the court.[1] Nor will the improper joinder of parties who are citizens of the same state affect the jurisdiction of the court if a decree may be properly entered as between the parties who are properly before the court.[2]

The general doctrine of chancery practice, however, is that all persons materially interested in the subject-matter of the suit ought to be made parties, either as plaintiffs or defendants; but this general rule is for the convenient and equitable administration of justice, and its application is more or less in the sound discretion of the court, and will usually be restricted to parties whose interests are in issue, and to be affected by the decree.[3] And in all cases the decree will be so framed and modified as not to prejudice the interests of those not made parties to the suit, or properly served with original process.[4] A court of equity should aim to do complete justice by embracing the whole subject, and deciding upon and settling the rights of all persons interested in the subject of the suit, in order to prevent future litigation;[5] and if the rights of an absent party must necessarily be affected and prejudiced by a decree, it should not be rendered, and objection to such a decree can be taken not only upon the hearing, but in the appellate court.[6] Where real property, after being mortgaged, was conveyed in trust for the benefit of children, including those in being and those that might be born, and a bill was brought to foreclose the mortgage, it was held that all the children *in esse* at the time of filing the bill were indis-

[1] Mallow *v.* Hinde, 12 Wh. 193; Vattier *v.* Hinde, 7 Pet. 252. No decree can be made which involves the rights of a party not before the court: Hamilton *v.* Savannah F. and W. R. Co., 49 Fed. Rep. 412; Collins Mfg. Co. *v.* Ferguson, 54 *id.* 721; California *v.* South Pac. Co., 157 U. S. 229, 256.

[2] Carneal *v.* Banks, 10 Wh. 181; Vattier *v.* Hinde, 7 Pet. 252.

[3] In a foreclosure suit brought by trustee of mortgage, bondholders, though not parties, are regarded as *quasi* parties, and may be heard: Fidelity, etc., Co. *v.* Mobile St. R. Co. 53 Fed. Rep. 850.

[4] Mechanics' Bank *v.* Setons, 1 Pet. 299.

[5] Caldwell *v.* Taggart, 4 Pet. 190; Marshal *v.* Beverly, 5 Wh. 313; Banks *v.* Carrolton Railroad, 11 Wall. 624; Consolidated Water Co. *v.* Babcock, 76 Fed. Rep. 243.

[6] Coiron *v.* Mellandon, 19 How. 113; Joy *v.* Wirtz, 1 Wash. 517.

pensable parties to bar a right of redemption, and that a decree against the trustees would not bind the *cestui que trusts*.[1] So part owners or tenants in common of real property have an interest in the subject-matter of a suit to partition the same, and each one is so intimately connected with his co-tenant that if they cannot all be subjected to the jurisdiction of the court, the bill should be dismissed.[2]

But a court of equity of the United States will not suffer its jurisdiction to be ousted because of the non-joinder of merely formal parties who are not entitled to sue or liable to be sued in its courts.[3] Where four parties had a dispute about their respective rights and interests in the stock of a railroad company, and entered into a contract of settlement by which the stock was to be divided in certain proportions between them, but one of the parties thereto refused to carry out the agreement, and another party filed a bill to compel him to stand by the agreement and to carry it into execution, to which the former answered, objecting that the other parties to the contract of settlement should have been made parties to the bill, it was held that, as no relief was asked of the other parties, they were not necessary parties to the bill.[4] So where a person filed a bill as administrator of a deceased partner, to have an account of the partnership concerns, and alleged in his bill that he was the sole heir of the deceased partner, it was held that the fact that he was not so could not affect the case, and that the bill was not objectionable for the want of necessary parties, as a decree in the case in his favor would not affect the rights of heirs who might claim a distribution of the money which might be decreed the complainant.[5]

[1] Clark *v.* Reyburn, 8 Wall. 318. See also Ribon *v.* Railroad Co., 16 *id.* 446.

[2] Barney *v.* The City of Baltimore, 6 Wall. 280; Traders' Bank *v.* Campbell, 14 *id.* 87. See also Hoxie *v.* Carr, 1 Sum. 173; Marshall *v.* Beverly, 5 Wh. 313.

[3] Wormley *v.* Wormley, 8 Wh. 421; *ante*, § 126 *et seq.*

[4] French *v.* Shoemaker, 14 Wall. 314.

[5] Moore *v.* Huntington, 17 Wall. 417. Parties not necessary: see Billings *v.* Aspen M. & S. Co., 10 U. S. App. 1, 322, affd. 150 U. S. 31; Bellows *v.* Sowles, 52 Fed. Rep. 528; U. S. *v.* Hendy, 54 *id.* 447; McGahan *v.* Bk. of Roundout, 156 U. S. 218.

When Parties are Numerous.

§ 246. Although it is a general rule in equity that all persons interested in the subject-matter of the suit should be made parties, to this there is an exception, as where the parties are so numerous as to make it impracticable, in which case a few, representing the interests of the many, are sufficient.[1] This exception is also embraced in the forty-eighth rule of practice prescribed by the Supreme Court for the courts of equity of the United States. It provides as follows: "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making them all parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties."[2]

And, as we have seen, proper but not necessary parties to a bill may be omitted or not served with process; as where they cannot be made parties without ousting the court of jurisdiction.[3]

Trustees Represent Parties Beneficially Interested; Executors and Administrators.

§ 247. In all suits concerning real estate which is vested in trustees by devise, if they have, by virtue of the devise, power to sell and give discharges for the proceeds, and charge of the rents and profits of the estate, they may properly represent, as parties to a bill, the persons beneficially interested in the estate or the rents and profits thereof, in the same manner and to the same extent as executors and administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it is not necessary to make the persons beneficially interested in such real estate, or the rents and profits thereof, parties to the suit. But the court may, upon

[1] Mandeville *v.* Riggs, 2 Pet. 482.

[2] West *v.* Randall, 2 Mason 181.

[3] Milligan *v.* Millege, 3 Cr. 220; Simms *v.* Guthrie, 9 *id.* 20; Kerr *v.* Watts, 6 Wh. 550; Potter *v.* Gardner, 12 *id.* 498; Hook *v.* Payne, 14 Wall. 252; *ante*, § 126, *et seq.* On the matter of parties as considered under the two preceding sections, see also Kendig *v.* Dean, 97 U. S. 424; Ober *v.* Gallagher, 93 *id.* 204.

consideration of the matter on the hearing, order such persons or any of them to be made parties.[1]

When an Heir-at-Law is not a Necessary Party; Joint and Several Debtors.

§ 248. It is not necessary to make the heirs-at-law parties in suits brought to compel the execution of the trusts of a will, but the plaintiff is at liberty to do so where he desires to have the will established against them.[2]

And if the plaintiff has a joint and several demand against several persons either as principals or sureties, it is not necessary to bring before the court all the persons liable on the contract or other demand, but he may proceed against one or more of them severally liable.[3]

Defect of Parties Suggested in the Answer; Practice.

§ 249. If the complainant omits to bring before the court persons who are necessary parties, and the defect does not appear on the face of the bill, the proper practice would be to set forth the defect by a plea or answer. If it is patent on the face of the bill, however, it could be taken advantage of by demurrer.[4] If it is suggested in the answer that there is a defect of parties to the bill, the plaintiff is at liberty to set the cause for hearing on that objection only; but it is necessary for him to state, in the entry of the hearing in the clerk's order-book, the purpose for which the same is set down, to the following effect, that is to say: "Set down upon the defendant's objection for want of parties." If he shall not so set down the cause for defect of parties, he will not, as of course, be allowed to amend his bill in this respect on the hearing of the cause.[5]

But if on a final hearing a bill is dismissed on the ground of a defect of parties, it should be without prejudice, as the complainant ought to be permitted to file a bill against all the proper

[1] Equity Rule 49; Potter *v.* Gardner, 12 Wh. 498. Corporations are indispensable parties to a bill which affects corporate rights or liabilities: Swan Land, etc., Co., *v.* Frank 148 U. S. 603.

[2] Equity Rule 50.

[3] Equity Rule 51. As to parties generally, see Carey *v.* Brown, 92 U. S. 171; Kerrison *v.* Stewart, 93 *id.* 155; Robertson *v.* Carson, 19 Wall. 94; Williams *v.* Bankhead, *Ibid.* 563.

[4] Story *v.* Livingstone, 13 Pet. 359; Carey *v.* Brown, 92 U. S. 171.

[5] Equity Rule 52.

and necessary parties at any time afterwards.[1] If, however, no objection is made to the bill for the want of necessary parties, either by demurrer, plea or answer, the court is at liberty, on the hearing of a cause, and on objection being made by the defendant on this ground, to proceed to a decree saving the rights of the absent parties.[2] But, if a decree cannot be rendered without manifest prejudice to the rights of those who should have been made parties, no decree should be entered, although no objection is made on that ground.[3]

Nominal Parties need not Appear.

§ 250. The parties served with a subpœna need not appear and answer a bill, where no account, payment, conveyance or other direct relief is sought against them, unless the plaintiff specially requires them to do so by the prayer of his bill. But they may appear and answer at their option. In case, however, they do not appear and answer, they will be bound by all the proceedings in the cause; and if the plaintiff shall require them to appear and answer, they are entitled to all the costs of the proceedings against them, unless the court shall otherwise direct.[4] The omission, as we have seen, of merely formal parties will not oust the jurisdiction of the court. If complete relief can be given in a cause to those who seek it, without affecting the interests of others not made parties, a decree for relief will be granted.[5]

Injunctions; When Granted of Course.

§ 251. If an injunction is asked for in the bill to stay proceedings at law, and the defendant does not enter his appearance and plead, demur or answer to the same within the time prescribed therefor by the rules of practice in equity, the plaintiff is entitled

[1] Kendig *v.* Dean, 97 U. S. 423; Barney *v.* Baltimore City, 6 Wall. 280; Home *v.* Mullen, 22 *id.* 42. The general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, is for the court to express in its decree that the dismissal is without prejudice: Swan Land, etc., Co. *v.* Frank, 148 U. S. 603.

[2] Equity Rule 53.

[3] Wallace *v.* Holmes, 9 Blatch. 65; Mechanics' Bank *v.* Setons, 1 Pet. 299; Legee *v.* Thomas, 3 Blatch. 11; Story *v.* Livingstone, 13 Pet. 359.

[4] Equity Rule 54.

[5] Joy *v.* Wirtz, 1 Wash. 517; Wormley *v.* Wormley, 8 Wh. 421; Mechanics' Bank *v.* Setons, 1 Pet. 299. See also Young *v.* Pott, 4 Wash. 521. See *ante* § 246, note.

as of course to such injunction, upon motion and without notice. Special injunctions are grantable only on due notice to the adverse party, by the court in term time or by a judge thereof in vacation, after a hearing. But the hearing may be *ex parte*, if the adverse party does not appear at the time and place designated in the notice. And in case an injunction is awarded in vacation, it will, unless previously dissolved by the judge granting the same, continue until the next term of the court or until dissolved by some other order of the court.[1] Unless other parties than those in the suit at law are made parties to the bill to enjoin, and different interests are involved, a bill to enjoin a judgment at law is not treated as an original bill; but if the bill makes others parties, having different interests, it is considered an original bill.[2]

Bills of Revivor and Supplemental Bills; Abatement.

§252. On general principles a suit is abated on the death of either party, but it is provided by Rule 56 for the equity courts of the United States that "whenever a suit shall become abated by the death of either party, or by any other event, it may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require." The bill should be filed by the proper parties entitled to revive the suit, and may be filed in the office of the clerk at any time;[3] and upon the suggestion of the facts the process of subpœna should be issued as a matter of course by the clerk, requiring the proper representatives of the other party to appear and show cause, if any, why the cause should not be revived. If at the next rule day occurring after fourteen days from the service of said process of subpœna, that is to say, the first Monday of the month after fourteen days from the service of the same, no cause shall be shown, the suit will stand revived as of course.[4]

In such a case the practice is to allow on the final hearing, the

[1] Equity Rule 55.

[2] Simms *v.* Guthrie, 9 Cr. 19; Dunn *v.* Clark, 8 Pet. 1. See also Marsh *v.* Bennett, 5 McLean 117; Worcester *v.* Truman & Smith, 1 *id.* 483.

[3] A bill of revivor may on motion be stricken from the records where no proceedings have been taken for twelve years: Hubbell *v.* Lankenau, 63 Fed. Rep. 881.

[4] Equity Rule 56; Equity Rule 2.

use of any testimony taken before the abatement, and which might have been used if no abatement had occurred. The suit, after revival, proceeds in the new form, unaffected by the change.[1] But it seems a bill of revivor cannot be entertained where the original jurisdiction depended upon the proper citizenship of the parties, and the controversy which it seeks to revive will be between citizens of the same state, although there was the requisite citizenship of the original parties; as where a bill of revivor is brought by an administrator who is a citizen of the same state with the defendant.[2]

When Supplementary Bills are Proper.

§ 253. If a suit in equity becomes defective by some event occurring after the filing of the bill, as, for instance, by the change of interest of parties in the matter in controversy, or for any other reason, a supplemental bill or a bill in the nature of a supplemental bill may be necessary.[3] Leave to file the same may be granted by any judge of the court on any rule day, upon any proper cause shown and on due notice to the other party. If leave is granted, the defendant must demur, plead or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time is assigned by a judge of the court.[4] But it is not necessary, in any bill of revivor or supplemental bill, to set forth any of the statements of the original bill, unless the special circumstances of the case may require it.[5]

Answers and Amendments Thereof.

§ 254. We have remarked that the rules in equity require an appearance of the defendant, in person or by attorney, on the

[1] Vattier *v.* Hinde, 7 Pet. 252.

[2] Clark *v.* Mathews, 2 Sum. 262.

[3] The rule applies to transfers of cause of action whether voluntary, by contract or deed, or by operation of law: Hazleton Tripod-Boiler Co. *v.* Citizens' St. R. Co., 72 Fed. Rep. 325.

[4] Equity Rule 57; Kennedy *v.* Georgia State Bank, 8 How. 610; Jenkins *v.* Eldredge, 3 Story 299; Parkhurst *v.* Kinsman, 2 Blatch. 72. A supplemental bill to modify a decree should be brought in the term at which the decree is entered: Omaha *v.* Redick, 63 Fed. Rep. 1.

[5] Equity Rule 58. See New York Security & Trust Co. *v.* Lincoln Street R. Co., 74 Fed. Rep. 67. For examples of bills not supplemental bills, but separate proceedings, see White *v.* Joyce, 158 U. S. 128; Great Western Tel. Co. *v.* Purdy, 162 *id.* 329.

next rule day, that is, the first Monday of the next succeeding month, if the defendant has been served with process twenty days before that time; if not, then at the next succeeding rule day. And he is required to file his plea, answer or demurrer to the bill on the next succeeding rule day after entering his appearance, unless the court shall, for cause shown, extend the time. In default of which the defendant may enter an order, as of course, in the order book, that the bill be taken *pro confesso*.[1] And unless there is a waiver of answer under oath, the defendant must verify it. This may be done before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a state or territory, or before any notary public.[2]

An answer may be amended of course, in any matter of form, or by filling up a blank, or correcting a date, or by reference to a document or other small matter, at any time before a replication is put in, or the cause is set down for a hearing upon the bill and answer; but the defendant should reverify it unless there is a waiver of the same. After a replication or such setting down for a hearing, it cannot be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court or a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported if required by affidavit.[3] If granted, the court or judge granting the same may require it to be separately engrossed as an amendment to the original answer, so as to be distinguishable therefrom.[4]

Leave to amend an answer after replication, or the cause is set down for a hearing, will not ordinarily be granted where the matter set up in the amended answer constitutes a new defence, and especially where it appears that the matters thus set up

[1] See *ante*, § 221.

[2] Equity Rule 59. In case of answer of a defendant beyond the seas: Read *v.* Consequa, 4 Wh. 335; Herman *v.* Herman, 4 Wash. 555.

[3] Gubbins *v.* Laughtenschlager, 75 Fed. Rep. 615. After the cause has been heard on exceptions to a master's report, leave to amend the answer is discretionary with the court: Hudson *v.* Randolph, 66 Fed. Rep. 216.

[4] Equity Rule 60.

could with reasonable diligence have been introduced into the original answer.[1]

Answer; Exceptions Thereto.

§ 255. If an answer is filed on any rule day, the plaintiff is allowed until the next succeeding rule day to file exceptions thereto for insufficiency, unless a longer time shall be allowed for that purpose upon cause shown to the court or a judge thereof; and if no exception is filed thereto within that time the answer will be taken to be sufficient.[2]

If exceptions are taken on the ground that certain allegations of the bill are neither answered, admitted nor denied, it is necessary to inquire whether the facts charged in the allegations are material and might contribute to establish the equity of the bill, If they do not, the exceptions should be overruled.[3] If an exception to an answer is taken on the ground of insufficiency, it should state the charges in the bill, the interrogatories applicable thereto to which the answer is responsive, and the language of the answer, so that the court may determine whether it is sufficient or not; and any exception is considered as waived by going to trial on the merits.[4]

When Exceptions will be Set down for a Hearing; Answer after Allowance.

§ 256. If exceptions are filed to an answer for insufficiency within the time prescribed by the rules of practice in equity, and the defendant does not submit to the same and file an amended answer on the next succeeding rule day, the defendant may forthwith set them down for a hearing on the next succeeding rule day thereafter before the court, and may enter as of course,

[1] India Rubber Co. *v.* Phelps, 8 Blatch. 85; Grier *v.* Gregg & Wald, 4 McLean 202; Walden *v.* Bodley, 14 Pet. 156.

[2] Equity Rule 61. When the circuit court, at a hearing upon exceptions to an answer in equity, sustains the exceptions and (the defendant electing to stand by his answer) enters a final decree for the plaintiff; and the Supreme Court, upon appeal, orders that decree to be reversed, and the cause remanded for further proceedings not inconsistent with its opinion; the plaintiff is entitled to file a replication and may be allowed by the circuit court to amend his bill; *In re* Sanford Fork & Tool Co., 160 U. S. 247.

[3] Hardeman *v.* Harris, 7 How. 726.

[4] Brooks *v.* Byam, 1 Story 296; Kitridge *v.* Race, 92 U. S. 116. See as to construction of pleadings, Brown *v.* Pierce, 7 Wall. 205.

in the order book, an order for that purpose. If he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer must be deemed sufficient; provided, however, that the court or any judge thereof may, for good cause shown, enlarge the time of filing exceptions or for answering the same upon such terms as may be deemed reasonable.[1] If the exceptions are allowed, it is the duty of the defendant to put in a full and complete answer on the next succeeding rule day, otherwise the bill may be taken as confessed so far as the matter referred to in the exceptions is concerned; or the plaintiff at his election may have a writ of attachment to compel the defendant to make a better answer to the matter of such exceptions, from which he will not be discharged except by putting in such answer, and complying with such other terms as the court or a judge may direct.[2] And if the exceptions shall be overruled, or the answer shall be adjudged insufficient, the prevailing party is entitled to the costs occasioned thereby, unless otherwise directed by the court or a judge thereof at the time of the hearing of the exceptions.[3]

Replication and Issue.

§ 257. If the answer shall not be excepted to, or shall be adjudged sufficient, the plaintiff is required to file the general replication thereto on or before the next succeeding rule day thereafter, when the cause will be deemed at issue without further pleading on either side. But if the plaintiff omits to file a replication within the time prescribed, the defendant is entitled to an order, as of course, for the dismissal of the suit, unless the court or a judge thereof shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, and the plaintiff submit to such other terms as may be directed. If no replication is filed, the answer is taken as true, and no evidence will be allowed to contradict it.[4] On failure to put in a general replication to an answer, the order of dismissal may be entered by the clerk of course, without any application to the court or a judge.[5]

[1] Equity Rule 63. [2] Equity Rule 64. [3] Equity Rule 65.

[4] Pierce *v.* West, 1 Pet. (C. C.) 351; Coleman *v.* Martin, 6 Blatch. 291; Equity Rule 66. See Gregory *v.* Pike, 67 Fed. Rep. 837.

[5] Robinson *v.* Satterlee, 3 Saw. 134. It is an irregularity to go to hearing without replication: Washington Railroad *v.* Bradleys, 10 Wall. 299.

The rule last cited provides that the court or a judge thereof may upon motion, and for cause shown, allow a replication to be filed. Where a bill was dismissed, but before the final decree was entered the plaintiff by motion asked leave to file a general replication and to take testimony, and offered to pay the accrued costs, but made no suggestion of mistake or inadvertence, it was held that the motion must be denied.[1]

Depositions; Commissions and Commissioners.

§ 258. When the cause is at issue, commissions to take testimony upon interrogatories may jointly or severally be taken out by the parties. If either party desires so to do, he is required to file the interrogatories in the clerk's office, and give ten days' notice to the opposite party to file cross interrrogatories, before the issuing of the commission. If no interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. The commissioner may be designated by the court or a judge thereof, or the presiding judge thereof may vest in the clerk power to name commissioners to take testimony. Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all witnesses to be examined shall be examined orally before one of the examiners of the court, or before an examiner specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings, and the parties must have an opportunity to be present on such examination, personally or by their counsel or solicitors, and the witnesses are subject to cross-examination and re-examination. The evidence must be taken down by the examiner, in writing, in the form of question put and answer given, provided that by consent of parties the examiner may take down the testimony of any witness in the form of narrative. At the request of either party the deposition of any witness may be taken down by a skillful stenographer or typewriter.[2] When completed the depositions must be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend. But if the witness shall refuse to sign the deposition, the examiner

[1] Ballenger *v.* Mackey, 14 Blatch. 355.

[2] See Ballard *v.* McCluskey, 52 Fed. Rep. 677.

may sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he cannot decide on the competency, materiality or relevancy of such questions. The court has power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just. The examiner has the same power to coerce the attendance of witnesses as in case of examination on written interrogatories.

The examiner in such cases may require reasonable notice to be given of the time and place of examination of witnesses to the opposite party; and when the same is concluded, the deposition, duly authenticated, should be transmitted by him to the clerk of the court, and be filed by him.[1]

Testimony, however, may be taken by commission on written interrogatories and cross interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge. If the evidence in a cause is to be taken orally, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of his bill, and a time thereafter within which the defendant must take his evidence in defence, and a time thereafter in which the complainant must take his evidence in reply; and no further evidence can be taken in the cause unless by agreement of the parties or by leave of court first obtained on motion for cause shown. The expense of the stenographer or typewriter is to be paid by the party calling the witness and included in the costs as finally imposed. Upon due notice the court may permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing.[2]

[1] Depositions taken by agreement before an officer qualified to administer oaths, not appointed examiner by the court, must be filed of record as required by this rule: J. L. Mott Iron Works *v.* Standard Mfg. Co., 48 Fed. Rep. 345.

[2] Equity Rule 67, as promulgated May 2, 1892; amended May 15, 1893, 144 U. S. 689; 149 *id.* 713. See White *v.* Toledo, St. L. & K. C. R. Co., 79 Fed. Rep. 133. Each interrogatory should be answered fully: Ketland *v.* Bissett, 1 Wash. 144; Bell *v.* Davidson, 3 *id.* 328. They should be at least substantially answered: Dodge *v.* Israel, 4 *id.* 323; Richardson *v.* Golden, 3 *id.* 109; Rhoades *v.* Selin, 4 *id.* 715.

Three Months Allowed after the Cause is at Issue for the Taking of Testimony.

§ 259. It is provided by a rule in equity that three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless a court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period can be read in evidence at the hearing except as aforesaid.[1]

This rule applies to the testimony of both parties; and the question whether the time should be enlarged is largely in the sound discretion of the court, and unless there should be a clear abuse of this discretion, the Supreme Court would not interfere;[2]

Testimony de Bene Esse; Notice; Form of the Last Interrogatory.

§ 260. If after any bill is filed, and before the defendant has answered the same, an affidavit is made and filed in the office of the clerk of the court, stating that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk is required to issue, as a matter of course, a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon due notice to the adverse party of the time and place of taking his or their testimony.

The last interrogatory must be in substance as follows: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."[3]

Defendant must Answer the Original Bill before the Plaintiff is Required to Answer the Cross-Bill.

§ 261. If a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, he must answer the

[1] Equity Rule 69. A deposition not taken within three months may be stricken from the files: Wenham *v* Switzer, 48 Fed. Rep. 612.

[2] Ingle *v.* Jones, 9 Wall. 486.

[3] Equity Rules 70, 71. See also Richardson *v.* Golden, 3 Wash. (C. C.) 109; Dodge *v.* Israel, 4 *id.* 323; Rhoades *v.* Selin, *Ibid.* 715.

original bill before the plaintiff is required to answer the cross-bill.[1] The answer in such a case to the cross-bill may be used at the hearing by the party filing the same in the same manner and under the same restrictions as an answer to an original bill may be read and used. A cross-bill depends upon the original one, and may be said to be a mere auxiliary suit. If its purposes are entirely different from those of the original bill, it cannot properly be considered a cross-bill, although the matters therein may have some relation to the same general subject. Nor can new parties be brought into a cause by a cross-bill.[2]

If a bill is filed to set aside an agreement or conveyance, and the defendant desires to have it established by a decree of the court, he may do so by filing a cross-bill for that purpose.[3] But a cross-bill cannot be properly filed without leave of court, and if so filed it will be set aside or dismissed.[4]

Appointment of Masters and their Compensation.

§ 262. The circuits courts have power to appoint standing masters in chancery in their respective districts, a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring in the appointment, and they may appoint a master *pro hac vice*, in any particular case. But no clerk of the district or circuit court or his deputy can be appointed either as receiver or master in any case, except where the judge shall determine that special reasons exist therefor, to be assigned in the order of

[1] Equity Rule 72; Allen *v.* Allen, Hemp. 58; Young *v.* Pott, 4 Wash. 521.

[2] Shields *v.* Barrow, 17 How. 130; Cross *v.* De Valle, 1 Wall. 1. For examples of bills not true cross-bills, but original bills, see Chattanooga Medicine Co. *v.* Thedford, 58 Fed. Rep. 347; Goff *v.* Kelly, 74 *id.* 327. If the bill is not a cross-bill, but an original bill, substituted service on plaintiff's attorney is not sufficient: Fidelity, etc., Co. *v.* Mobile St. R. Co., 53 Fed. Rep. 850. If a defendant seeks affirmative relief he must file a cross-bill: White *v.* Bower, 48 Fed. Rep. 186; see also Pullman's Palace Car Co. *v.* Central Transp. Co., 49 *id.* 261. A complainant is not allowed to discontinue where an injunction has been granted and the defendant seeks by cross-bill to take advantage of testimony and secure his rights: Pullman's Palace Car Co. *v.* Central Transp. Co., *supra*.

[3] Carnocan *v.* Christie, 11 Wh. 646.

[4] Bronson *v.* La Crosse and M. R. Co., 2 Wall. 283. For further discussion of practice under cross-bills see The Dove, 91 U. S. 385; Veach *v.* Rice, 131 *id.* 293; Kingsbury *v.* Buckner, 134 *id.* 650.

appointment. The compensation to be allowed the master is to be fixed by the court in each particular case, and such compensation must be charged upon and borne by such of the parties in the cause as the court shall direct. He cannot, however, retain the report as security for his compensation, but where it is allowed he is entitled to an attachment against the party who is ordered to pay the same, if upon notice thereof he does not pay it within the time prescribed by the court.[1]

Reference and Proceedings Before Masters.

§ 263. It is not the practice in all cases for courts of equity to refer causes to a jury or master, to ascertain the facts, but they may do so themselves, or refer them to a jury or a master.[2]

If, however, the bill calls for an account, and this is complex and intricate, it should be referred to a commissioner or master, to be examined and reported by him.[3] This reference can only be made after an interlocutory decree, on the general merits of the plaintiff's bill. The master may take evidence upon written interrogatories, or *viva voce*, the parties to the suit being present personally or by counsel, or having due notice thereof, and an opportunity to appear before him.[4]

Exceptions to the report of a master may be taken by either party. The errors should be specifically pointed out, as the parts not excepted to will be considered as correct and admitted.[5]

It is the duty of the master, upon every reference to him, within a reasonable time to assign a time and place for proceedings on the same, and to give due notice thereof to each of the parties or their solicitors; and if either party fails to appear at

[1] Equity Rule 82; act of Congress, 1879, ch. 183, p. 415.

[2] As to rules in matters of reference to juries, see Wilson *v.* Riddle, 123 U. S. 608; Idaho, etc. *v.* Bradbury, 132 *id.* 509.

[3] A master to whom an account is referred, cannot pass upon the entire case although there is no objection: Oteri *v.* Scalzo, 145 U. S. 578, 589.

[4] Field *v.* Holland, 6 Cr. 8; Story *v.* Livingston, 13 Pet. 359. If the bill for the balance of an account is taken *pro confesso*, the account must be referred to a master: Pendleton *v.* Evans' Ex'r, 4 Wash. 391; Equity Rule 77.

[5] Dubourg *v.* United States, 7 Pet. 625; Walker *v.* Kinnare, 76 Fed. Rep. 101. Exceptions may only be taken to matters heard and determined by the master, not to merely ministerial matters, such as a sale: Pewabic Mining Co. *v.* Mason, 145 U. S. 349.

the time and place appointed, he may proceed *ex parte*, or in his discretion adjourn the examination and proceedings to a future day, giving the absent party or his solicitor due notice thereof. It is the duty of the master to proceed with all reasonable diligence in every reference to him, and with the least practicable delay; and either party may apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.[1] It is the duty of the party procuring a reference to cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference is made; and if he fail to do so, the adverse party is at liberty forthwith to cause proceedings to be had before the master at the costs of the other party.[2] The report should not contain any state of facts, charge, affidavit, deposition, examination or answer, or any part thereof, brought in or used before the master, but they should be referred to and identified so as to enable the court to determine what was brought in or used.[3] The court will not investigate the items of an account, nor review the whole testimony taken before a master.[4] Exceptions should be filed pointing out the particular portion of the testimony on which the party excepting relies.[5]

Hearing Before a Master; Evidence.

§ 264. The master has full authority to examine the parties in a cause upon oath touching all matters contained in the reference; and he has authority to require the production of all books, papers, writings, vouchers and other documents relating thereto. He may also examine on oath, *viva voce*, all witnesses produced by the parties before him, and order the examination of other witnesses to be taken, under a commission issued upon his certificate, from the clerk's office, or otherwise as provided by acts of Congress or by the rules in equity; and may direct the mode in which the matters requiring evidence shall be

[1] Equity Rule 75.

[2] Equity Rule 74.

[3] Equity Rule 76.

[4] Harding *v.* Handy, 11 Wh. 103.

[5] As to exceptions to master's reports, and what will be considered, see Callaghan *v.* Myers, 128 U. S. 617; Kimberly *v.* Arms, 129 *id.* 512; Tyler *v.* Savage, 143 *id.* 79; Stuart *v.* Greenbrier, etc., Co., 144 *id.* 104; Furrer *v.* Ferris, 145 *id.* 132.

proved before him, and do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits of the case and the rights of the parties.[1]

How Witnesses are Procured.

§ 265. Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before a commisioner appointed to take testimony, or before a master or examiner appointed in any cause, by a subpœna in the usual form, which may be issued by the clerk of the court, in blank, and filled up by the party praying for the same, or the commissioner, master or examiner, requiring the attendance of the witness at the time and place specified; and he is allowed for his attendance the same fees as for attendance in court. If he refuses to appear after due service of the subpœna, he is guilty of a contempt of court, which being certified to the clerk's office by the commissioner, master or examiner, an attachment may issue for a contempt on the order of the court or a judge thereof, in the same manner as for failure to attend, or for refusing to testify in court.[2] When a witness has been once examined, and his deposition used on the hearing, he cannot be re-examined before the master without a special order of the court; and if leave is thus granted, he can, usually, only be examined in respect to facts not before testified to by him, and not then in issue.[3] But the court may in its discretion, if it is deemed advisable, allow the examination of witnesses *viva voce*, in any case, in open court.[4]

How Accounts Must be Brought in; Examination of Party.

§ 266. All parties accounting before a master must bring in their respective accounts in the form of debtor and creditor, and any of the other parties not satisfied therewith may examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master may direct.[5] And all affidavits, depositions and documents which have been previously

[1] Equity Rule 77; Harding *v.* Handy, 11 Wh. 103; Story *v.* Livingston, 13 Pet. 359.

[2] Equity Rule 78.

[3] Gass *v.* Stinson, 2 Sum. 605; Jenkins *v.* Eldridge, 3 Story 299.

[4] Equity Rule 78.

[5] Equity Rule 79.

made, read or used in the court upon any proceeding in any cause or matter may be used before the master. So the master may examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, and the testimony must be taken down, if either party requires it, for use in court.[1]

Exceptions to the Report of a Master; when Filed.

§ 267. Exceptions may be taken to the rulings of a master in chancery, but they should be taken at the time and entered in his minutes.[2] When the master's report is completed it is his duty to return the same into the clerk's office, and of the clerk to make an entry of the day of the return in the order book. After that is done the parties have one month in which to file exceptions to the same. If no exceptions are filed by either party within that time, the report will stand confirmed on the next rule day after the month is expired. But if they are filed, they will stand for a hearing before the court if then in session; if not in session, then at the next sitting which shall be held thereafter.[3] In making exceptions a general assignment of errors is insufficient, but they should state article by article the parts of the report to which exception is taken.[4]

An exception to a master's report is not in the nature of a special demurrer, nor is it required to be so full and specific; but it should distinctly point out the finding and conclusions of the master which it seeks to set aside.[5] If a master or referee has

[1] Equity Rule 80.

[2] Troy Iron and Nail Factory *v.* Corning, 6 Blatch. 328; Oliver *v.* Platt, 3 How. 333; Harding *v.* Handy, 11 Wh. 103.

[3] Equity Rule 83; Gasquet *v.* Crescent City Brewing Co., 49 Fed. Rep. 493. Where a court of equity has entered a decree establishing the interests of the different parties to a suit on a mining property, and their rights to respective portions of the profits of the mine, the court may take the testimony returned by the master and state the account itself instead of requiring the master to state the account; and such action upon the part of the court does not deprive the parties of the rights secured by Equity Rule 83; Wheeler *v.* Billings, 36 U. S. App. 419.

[4] Dexter *v.* Arnold, 2 Sum. 108; Story *v.* Livingston, 13 Pet. 359; Green *v.* Bishop, 1 Cliff. 186; Sheffield & B. C. I. & R. Co. *v.* Gordon, 151 U. S. 285. See also Gay Mfg. Co. *v.* Camp, 68 Fed. Rep. 67; McElroy *v.* Swope, 47 *id.* 380.

[5] Foster *v.* Goddard, 1 Black. 506. And see Farrer *v.* Bernheim, 75 Fed. Rep. 136; Sheffield & B. C. I. & R. Co. *v.* Gordon, 151 U. S. 285. See note, *ante*, § 263.

followed the order and judgment of the court on the reference, no objection can be taken on appeal from the final judgment of the court on account of error in the original or interlocutory judgment by which the reference was made and the specific directions given.[1]

Costs on exceptions are regulated by rule as follows: "The party whose exceptions are overruled must, for the overruled exceptions, pay costs to the other party, and for those sustained or allowed he is entitled to costs, the costs in each case to be fixed by the court, by a standing rule of the circuit court.[2]"

Decrees; Clerical Mistakes may be Corrected; what Decrees Should Contain.

§ 268. It is provided by rule that any clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the enrollment thereof, be corrected by order of the court or a judge thereof upon petition, without the form or expense of a rehearing.[3]

The practice in England is to recite in the decree the substance of the bill and answer and other pleadings, and the facts on which the court founds its decree. But in this country the pleadings and decree are a part of the record; and by a rule of court in equity, neither the bill, answer nor other pleadings should be recited or stated in the decree or order.[4] They should begin as follows: "This cause came on to be heard (or to be further heard as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:"

[1] New Orleans *v.* Gaines, 15 Wall. 624.

[2] Equity Rule 84.

[3] Equity Rule 85. A court of equity has full power to rehear, change, modify or vacate its decrees during the term at which they were entered, but not after: Bronson *v.* Schulter, 104 U. S. 410; Henderson *v.* Carbondale Coal & Coke Co., 140 *id.* 25; Hickman *v.* Fort Scott, 147 *id.* 415; Michigan, etc., Co., *v.* Eldred, 143 *id.* 293; Hicklin *v.* Marco, 64 Fed. Rep. 609. It is error to sign a bill of exceptions after the final adjournment of the court for the term without an order extending the time for its presentation, or the consent of the parties thereto or a standing rule authorizing it to be done, and when the errors assigned arise upon the bill so signed the judgment will be affirmed: U. S. *v.* Jones, 149 U. S. 262. See also Hume *v.* Bowie, 148 *id.* 245.

[4] Whiting *v.* Bank of U. S., 13 Pet. 6; Equity Rule 86.

[Here insert the decree or order.]

Guardians and Prochein Amis, Appointment of.

§ 269. The law supposes infants to be incapable of understanding and managing their affairs, and the duty of watching their interests devolves to a considerable extent upon courts both of law and equity. They defend by guardian, who is usually the nearest relation not interested in the matter in question or controversy.[1] It is provided by a rule in equity as follows: "Guardians *ad litem* to defend a suit may be appointed by the court, or any judge thereof, for infants or other persons who are under guardianship or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the court may direct for the protection of infants and other persons."[2]

Rehearing, What the Petition for should Contain.

§ 270. A rehearing is only allowed where some plain omission or mistake has been made, or where something material to the decree has been brought to the notice of the court, which had been overlooked.[3] The rule in equity on this subject provides: "Every petition for a rehearing shall contain special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, and shall be verified by the oath of the party or some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court.[4] But if no appeal lies the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court."[5] The petition must usually state some reason for the rehearing which would be good ground for a new trial

[1] Bank of U. S. *v.* Ritchie, 8 Pet. 128.

[2] Equity Rule 87.

[3] Jenkins *v.* Eldridge, 3 Story 299.

[4] Where a motion for rehearing is pending, the time limited for appeal does not begin to run until the motion is disposed of: Aspen Mining and S. Co. *v.* Billings, 150 U. S. 31, 36.

[5] Equity Rule 88. For interpretation of this rule see Moelle *v.* Sherwood, 148 U. S. 21; Hoffman *v.* Knox, 50 Fed. Rep. 484.

at common law.[1] If the ground for the rehearing is newly-discovered evidence, it should appear that it was unknown at the trial and could not with due diligence have been discovered.[2] But a new trial will not be granted on the mere certificate of counsel that there is sufficient cause for it.[3]

Rules may be made by the Circuit Courts.

§ 271. We have observed that the Supreme Court has, by virtue of the statute conferring that power, prescribed certain rules for the circuit courts, both at law and in equity; and that court has, by rule, conferred authority upon the circuit courts to make other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules prescribed by the Supreme Court, provided a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge] for the district, concur therein. They may also alter and amend such rules.[4] The power thus conferred gives the circuit courts the right to prescribe the time and manner of appearing and answering, the mode of conducting trials, the order of introducing evidence and the times when it must be introduced; but these rules may be waived or modified by the circuit court so as to prevent them from working injustice, and they must not be inconsistent with the general rules of practice prescribed by the Supreme Court.[5]

Decrees in Cases of Forclosure.

§ 272. It is further provided by a general rule of the Supreme Court that in suits in equity for the forclosure of mortgages in the circuit courts, or in any court of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due the complainant over and above the proceeds of the sale or sales, and that execution may issue for the collection of the same, in the same manner as where the decree is solely for the payment of money.[6]

[1] Hunter *v.* Marlboro', 2 Woodb. & M. 168.

[2] Bentley *v.* Phelps, 3 Woodb & M. 403.

[3] Emerson *v.* Davis, 1 Woodb. & M. 21; Tufts *v.* Tufts, 3 *id.* 426.

[4] Equity Rule 89.

[5] Poultney *v.* La Fayette, 12 Pet. 472; Philadelphia and Trenton R. Co. *v.* Stimpson, 14 *id.* 448; Bank of U. S. *v.* White, 8 *id.* 262; Russell *v.* McLellan, 3 Woodb. & M. 157.

[6] Equity Rule 92.

CHAPTER XI.

CIRCUIT COURTS OF APPEALS.

Circuit Courts of Appeals Established.

§ 273. Under the Revised Statutes and acts amendatory thereof writs of error and appeals from the final judgments and decrees of the circuit courts were heard and determined by the Supreme Court of the United States. To furnish means for the speedy hearing and disposing of the increasing litigation of the country, and to relieve the Supreme Court of much of the great mass of business that had unavoidably accumulated on its docket for years past, and to prevent such an accumulation in the future, Congress, by the act of March 3, 1891,[1] established the circuit courts of appeals.

Sec. 1. This act provided for the appointment of an additional circuit judge in each circuit,[2] with the same powers and compensation as the other judges of the circuit courts.

Sec. 2. In each circuit is created a circuit court of appeals, consisting of three judges, of whom two shall be a quorum, which shall be a court of record with appellate jurisdiction.[3]

The court is to adopt a seal and prescribe the form of its writs and other process and procedure.

The marshal of the district where the court is held performs the duties of marshal of the court.[4]

[1] Act of March 3, 1891, ch. 517, 2 Supp. R. S. 901–5.

[2] By act of July 23, 1894, ch. 147, 2 Supp. R. S. 203, an additional circuit judge is to be appointed in the eighth circuit.

[3] The circuit court of appeals will not consider themselves bound by decisions of circuit courts, though they will give them careful consideration: National Cash Reg. Co. *v.* Amer. Cash Reg. Co., 3 U. S. App. 340; Amer. Mort. Co. *v.* Hopper, 29 *id.* 12.

[4] Act of July 16, 1892, ch. 196, par. 9, 2 Supp. R. S. 40.

The court is to appoint a clerk, who shall have the same duties and powers in regard to matters within its jurisdiction as the clerk of the Supreme Court of the United States.[1]

The costs and fees in each circuit court of appeals shall be fixed and established by said court in a table of fees. *Provided*, that the costs and fees so fixed by any court of appeals shall not, with respect to any item, exceed the costs and fees now charged in the Supreme Court.[2]

The court shall have power to establish rules.

Sec. 3. The Supreme Court justices assigned to each circuit, the circuit judges of each circuit, and the several district judges in each circuit, shall be competent to sit as judges of the circuit court of appeals in their respective circuits.

If a justice of the Supreme Court is present he shall preside; if not, the circuit judge, senior in commission, shall preside.

The district judges may sit to make up the full court, when the Supreme Court justice and circuit judges are not sufficient. But no justice or judge shall sit on appeal from his own decision.

A term shall be held annually in the several circuits at the following places: 1st circuit, Boston; 2d, New York; 3d, Philadelphia; 4th, Richmond; 5th, New Orleans; 6th, Cincinnati; 7th, Chicago; 8th, St. Louis; 9th, San Francisco. And in such other places in each circuit as the court may designate.

The first terms of the courts shall be held on the third Tuesday in June, 1891, and thereafter at such times as may be fixed by the courts.[3]

Appellate Jurisdiction of Circuit Courts Abolished.

§ 274. Sec. 4. The appellate jurisdiction of the existing circuit courts is abolished. All appeals from the district and circuit courts shall be to the Supreme Court or the circuit court of appeals.[4]

[1] Where a clerk of the circuit court accepts the office of clerk of the circuit court of appeals, he may still retain his former position: U. S. *v.* Harsha, 16 U. S. App. 13.

[2] As amended by act of Feb. 19, 1897, 29 Stat. L. 536, 2 Supp. R. S. 551. This table of fees was to be adopted within three months from the passage of the act, and submitted to and within one year revised by the Supreme Court.

[3] Originally to have been held on 2nd Monday in January, 1891, but changed by joint resolution of March 3, 1891. See rules, *post*.

[4] The act is not retroactive: an appeal taken prior to its passage is not

Appeals direct to Supreme Court.

§ 275. Sec. 5. Appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:[1]

In any case in which the jurisdiction of the court is in issue: in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

Where the question of jurisdiction is the only one presented in the record the circuit court of appeals has no jurisdiction; but where other questions are involved the circuit court of appeals may consider the question of jurisdiction and decide whether it is sufficiently important to certify to the Supreme Court.[2] If there are other questions that must be decided, besides the question of jurisdiction, the circuit court of appeals has jurisdiction.[3] The circuit court of appeals has jurisdiction over the question of jurisdiction of the court below, unless the issue has been made in the court below and certified to the Supreme Court.[4]

From the final sentences and decrees in prize causes.

In cases of conviction of a capital [or otherwise infamous] crime.[5]

In any case that involves the construction or application of the Constitution of the United States.[6]

affected by it, although the citation was not signed nor served until afterward: U. S. *v.* Nat. Ex. Bk. of Milwaukee, 9 U. S. App. 145; Mattingly *v.* Northwestern Va. R. Co., 158 U. S. 53. And the jurisdiction of the Supreme Court over pending cases is preserved: Gulf C. & S. F. R. Co. *v.* Shane, 157 U. S. 348.

[1] Where a circuit court affirms its own decree in obedience to a mandate and declares that the decree of the circuit court of appeals is made its decree, an appeal will not lie to the Supreme Court, as it would be an appeal from the decree of the circuit court and not from the circuit court of appeals: Webster *v.* Daly, 163 U. S. 155.

[2] B. & O. R. Co. *v.* Myers, 18 U. S. App. 569.

[3] Shreve *v.* Cheesman, 69 Fed. Rep. 785; Coler *v.* Grainger County, 74 *id.* 16.

[4] King *v.* McLean Asylum, 21 U. S. App. 407. See *post*, ch. xiv.

[5] The act was amended by striking out the words in brackets, the amendment not to apply to pending cases; and appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital: Act of Jan. 20, 1897, ch. 68, 29 Stat. L. 492, 2 Supp. R. S. 541.

[6] Where the construction or application of the Constitution is involved, the circuit court of appeals has no jurisdiction: City of Macon *v.* Ga. Packing Co., 13 U. S. App. 592.

In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question.

In any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a state, nor the construction of the statute providing for review of such cases.[1]

Appellate Jurisdiction of Circuit Courts of Appeals.

§ 276. Sec. 6. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error[2] final decisions in the district courts and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law.

The appellate jurisdiction not vested in the Supreme Court is vested in the circuit courts of appeals, and the entire jurisdiction distributed.[3] "The words 'unless otherwise provided by law' were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when expressly so provided. Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws would defeat the purpose of the act and be inconsistent with its context and its repealing clause."[4]

[1] This section will be considered more at length in ch. xiv., *post.* Neither a circuit court of appeals nor a circuit court has appellate jurisdiction over state courts: Elder *v.* Richmond Gold & Silver Min. Co., 19 U. S. App. 118.

[2] Judgments at law must be reviewed by writ of error and not appeal: Nelson *v.* Huidekoper, 30 U. S. App. 88; Deland *v.* Platte County, 155 U. S. 221. The circuit court of appeals cannot review proceedings unless the record shows that a writ of error has in fact been issued: Jones's Admr. *v.* Ferst, 30 U. S. App. 87.

[3] McLish *v.* Roff, 141 U. S. 661, 666.

[4] Lau Ow Bew *v.* U. S. 144 U. S. 47. The circuit court of appeals has jurisdiction by writ of error or appeal to review a judgment or decree in a suit brought against the United States under the act of March 3, 1887, ch. 359, 24 Stat. L. 505: U. S. *v.* Morgan, 27 U. S. App. 410; U. S. *v.* Madrazo, 38 *id.* 515; U. S. *v.* Coudert (2d Circ.), 73 Fed. Rep. 505.

A judgment founded upon an award of arbitrators may be reviewed: Nolan *v.* Colo. Centr. Consd. Min. Co., 27 U. S. App. 427.

Decisions of Circuit Courts of Appeals, when Final.

§ 277. And the judgments or decrees of the circuit courts of

A circuit court of appeals has no jurisdiction to review the decrees of a circuit court in bankruptcy proceedings: *In re* Briggs, 20 U. S. App. 579; Huntington *v.* Saunders, 72 Fed. Rep. 10; *Cf.* Duff *v.* Carrier, 3 U. S. App. 552.

An appeal lies from the final decision of a district judge in chambers in a *habeas corpus* case: Webb *v.* York, 74 Fed. Rep. 753; see also King *v.* McLean Asylum, 21 U. S. App. 481. And from the order of a district court refusing an order for a warrant for removal under Rev. Stat. § 1014: U. S. *v.* Fowkes, 3 U. S. App. 247. An appeal cannot be taken from the order of a circuit judge at chambers remanding a prisoner in a *habeas corpus* proceeding: McKnight *v.* James, 155 U. S. 685; Lambert *v.* Barrett, 157 *id.* 697.

The circuit court of appeals will not, if it can avoid it, pass upon an averment that a statute and a state constitution are in conflict: Jersey City Gas Lt. Co. *v.* United Gas Imp. Co., 17 U. S. App. 170.

Inquiry in the circuit court of appeals must be limited to matters presented to and considered by the court below: St. Louis and S. F. R. Co. *v.* Bradley, 2 U. S. App. 637. But the question of the jurisdiction of the circuit court, though not raised in argument in the circuit court of appeals, must be noticed in the latter court and the case remanded to the state court if the circuit court never had jurisdiction: Robbins *v.* Ellenbogen, 36 U. S. App. 242; and a case may be remanded for want of jurisdiction although no motion to remand was made in the court below: Barth *v.* Coler, 19 U. S. App. 646. Costs on reversal for want of jurisdiction of the circuit court may be ordered as justice and right seem to require: Tug River Coal and Salt Co. *v.* Brigel, 31 U. S. App. 665; see Southwestern Tel. Co. *v.* Robinson, 2 *id.* 148.

A circuit court of appeals cannot review by writ of error the judgment of a circuit court in execution of a mandate of the Supreme Court when the action of the circuit court conforms to the mandate and there are no subsequent proceedings not settled by the terms of the mandate itself: Texas and Pac. R. Co. *v.* Anderson, 149 U. S. 237.

When a circuit court of appeals properly takes jurisdiction on appeal from a final decree it may go beyond a mere reversal and enter such decree as the court below should have entered on the whole case, and review all interlocutory proceedings, with regard to which proper objections have been made, but it has no jurisdiction to direct what course the lower court should pursue in order to ascertain whether evidence is or is not admissible: Potter *v.* Beal, 5 U. S. App. 49.

In common law actions tried by a jury the circuit court of appeals cannot review or retry the facts: Gulf, Col. and S. F. R. Co. *v.* Ellis, 10 U. S. App. 640. Where questions of fact are left to a trial court its findings are binding in the appellate court if there be any evidence to support them: Fisher *v.* U. S. Nat. Bank, 26 *id.* 448. It is not within the power of a circuit court of appeals to consider the question whether a verdict is excessive: St. Louis, I. M. and S. R. Co. *v.* Spencer, 36 *id.* 229: Home-

appeals shall be final[1] in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states;[2] also in all cases arising under the patent laws,[3]

stake Mining Co. *v.* Fullerton, *Ibid.* 32; and where there is evidence to sustain a verdict this court has no power to rectify a mistake of the jury in the amount thereof: Crosby Lumber Co. *v.* Smith, 3 *id.* 125: nor can the court settle questions of law which may depend upon undisclosed facts, or questions of fact upon *ex parte* affidavits of a general character: Dooley *v.* Hadden, 38 *id.* 651.

[1] If the decree of the circuit court of appeals is final, a decree upon an intervention in the same suit will be final: Gregory *v.* Van Ee, 160 U. S. 643; Rouse *v.* Letcher, 156 *id.* 47. Its decision is not final in an action for damages against a railroad company chartered under the laws of the United States: Union Pac. R. Co. *v.* Harris, 158 U. S. 326.

The Supreme Court has jurisdiction to pass upon the question whether a decision of the circuit court of appeals is or is not final: Aztec Mining Co., *v.* Ripley, 151 U. S. 79.

[2] When the jurisdiction of the circuit court of appeals is invoked solely on the ground of diverse citizenship its decision is final, even though another ground for jurisdiction may appear in the subsequent proceedings: Colo. Centr. Cons. Min. Co. *v.* Turck, 150 U. S. 138; Borgmeyer *v.* Idler, 159 *id.* 408; Press Publishing Co. *v.* Monroe, 164 *id.* 105; *Ex p.* Jones, *Ibid.* 691. When a circuit court acquires jurisdiction over an intervenor's petition by reason of its relating to an equity suit depending solely upon diverse citizenship, the decision of the court of appeals is final: Rouse *v.* Hornsby, 161 U. S. 588.

[3] The judgment of a circuit court of appeals in a suit brought by the United States to cancel a patent for an invention is not final, but may be appealed to the Supreme Court: U. S. *v.* Amer. Bell Tel. Co., 159 U. S. 548, in which case the court said: "Where the appellate jurisdiction is described in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or to restrict such jurisdiction; and any statute claimed to have that effect must be examined in the light of the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."

under the revenue laws, and under the criminal laws,[1] and in admiralty cases.[2]

Questions may be Certified to Supreme Court.

§ 278. Excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.[3] And thereupon the Supreme

[1] A *sci. fa.* upon a recognizance of bail in a district court is within the meaning of this section: Hunt *v.* U. S. 166 U. S. 424. A writ of error does not lie in behalf of the United States in a criminal case: U. S. *v.* Sanges, 144 *id.* 310.

[2] The act of Feb. 16, 1875, ch. 77, providing that in admiralty causes circuit courts shall make separate findings of fact and conclusions of law thereon, and that the Supreme Court's power of review on appeal shall be limited to the questions of law arising on the record and rulings and properly presented by a bill of exceptions, does not apply to the circuit courts of appeals. Appeals to those courts bring up all the evidence and may be tried *de novo:* The Havilah, 1 U. S. App. 1; The Portland and the State of California, 7 *id.* 20; The Sirius, *Ibid.* 660; The E. A. Packer, 14 *id.* 684. The practice of hearing a case *de novo* is to be used cautiously and only in cases of extreme necessity: The Glide, 25 *id.* 636. The court of appeals will not change a decree in a salvage case unless a strong case of abuse or mistake in the exercise of discretion, is shown: The Florence, 38 *id.* 32. See also The Philadelphian, 21 *id.* 90. Pending an appeal the court of appeals will not direct the disposition of funds paid into the district court: McAndrews *v.* Mignano, 1 U. S. App. 312. When a decree is affirmed the libellant (appellee) is entitled to interest on the whole decree, unless there are special circumstances to induce the court to direct otherwise: The Umbria, 11 U. S. App. 691.

[3] The circuit court of appeals must certify distinct questions or propositions of law, unmixed with questions of fact, or of mixed law and fact; and not the whole case: Graver *v.* Faurot, 162 U. S. 435; Cross *v.* Evans, 167 *id.* 60. The certificate should show clearly that instruction is desired upon particular points: Columbus Watch Co. *v.* Robbins, 148 U. S. 266; see also U. S. *v.* Thomas, 151 U. S. 577. It is irregular if a quorum of the court did not sit: Cinc. H. & D. R. Co. *v.* McKeen, 149 U. S. 259. The certification is for the instruction of the court and entirely within its discretion; a party before the argument cannot move to have questions certified to the Supreme Court: Louisville N. A. & C. R. Co. *v.* Pope (7th Circ.), 74 Fed. Rep. 1. Where there is a question of the jurisdiction of the court below, and the case is certified, the certificate must be granted during the term at which the decree was entered: Colvin *v.* Jacksonville, 158 U. S. 456.

Rule 37 provides that the certificate shall contain a proper statement of the facts on which the question or proposition of law arises. For ex-

Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.[1]

Supreme Court may Review by Certiorari.

§ 279. And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.[2]

ample of a certificate held not to comply with this rule, see Cinc. H. & D. R. Co. *v.* McKeen, 149 U. S. 259.

Certificates of division in criminal cases under Rev. Stat. §§ 651 and 697, are done away with; certificates by circuit courts of questions of jurisdiction, and certificates by circuit courts of appeals of questions upon which they desire instruction, are the only ways by which a case may be reviewed by certificate. The general rules formerly governing certificates of decision are applicable to certificates under this act: U. S. *v.* Rider, 163 U. S. 132.

[1] See Cinc. H. & D. R. Co. *v.* McKeen, 149 U. S. 259; and cases in last note.

[2] Only questions of gravity and importance should be certified. The Chinese restriction acts were held to involve questions of sufficient importance to be certified: Lau Ow Bew, Petitioner, 141 U. S. 583; Same *v.* U. S., 144 *id.* 47. See also *In re* Woods, 143 *id.* 202. So a writ of certiorari was issued in a case involving the construction of the U. S. neutrality laws, during the insurrection in Cuba: The Three Friends, 166 U. S. 1. Where a circuit court of appeals in one circuit has given a different decision from the circuit court of appeals in another circuit, under the same conditions, it may furnish ground for a certiorari: Columbus Watch Co. *v.* Robbins, 148 U. S. 266. The Supreme Court may direct any case, the decision of which is made final in the circuit court of appeals, to be brought up on certiorari; but will not exercise this power except in important cases as before stated: Amer. Const. Co. *v.* Jacksonville T. & K. W. R. Co., 148 U. S. 372; Lau Ow Bew *v.* U. S., 144 *id.* 47; and cases cited *ante*. The power may be exercised at any time while the case is pending; or the transcript of the record in the circuit court is in the court of appeals, even though a mandate has gone down: The Conqueror, 166 U. S. 110; Forsyth *v.* Hammond, 166 *id.* 506. When a case is brought up on certiorari the entire case is

Appeals from Circuit Courts of Appeals to Supreme Court.

§ 280. In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.[1]

But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed.[2]

Appeals in Injunction Cases.

§ 281. Sec. 7. That where, upon a hearing in equity in a district court or a circuit court an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve an injunction to the circuit court of appeals.

Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal.

And provided further, That the court below may in its discretion require as a condition of the appeal, an additional injunction bond.[3]

before the Supreme Court: Panama R. Co. *v.* Napier Shipping Co., 166 *id.* 280. When an admiralty case is brought to the Supreme Court by certiorari, the concurring decisions of the district court and the circuit court of appeals upon a question of fact are to be followed unless clearly shown to be erroneous: Compania de Navigacion la Flecha *v.* Brauer, 18 Sup. Ct. Repr. 12.

[1] See chapter xiv., p. 332.

[2] After the time has expired the circuit court of appeals cannot vacate its judgment in order to allow an appeal: Webster *v.* Daly, 38 U. S. App. 696.

[3] Sec. 7, as amended by act of Feb. 18, 1895, ch. 96, 28 Stat. L. 666, 2 Supp. R. S. 376. This section is of a highly remedial nature, and gives a party the right to appeal in any case of an interlocutory order or decree, granting an injunction at any stage of the proceedings, whether technically, preliminary, interlocutory or final, which restrains the use of property or the prosecution of business, in order that errors may be corrected without the delay incident to the final deter-

Traveling Expenses of Judges.

§ 282. Sec. 8 provides that judges attending the circuit court of appeals at places other than where they reside shall be paid reasonable traveling expenses.

mination of the cause: Dudley E. Jones Co. *v.* Munger Mfg. Co., 2 U. S. App. 188; Andrews *v.* Nat. Foundry & Pipe Works, 18 *id.* 458; s. c. 24 *id.* 81; Richmond *v.* Atwood, 5 *id.* 151, in which the whole case was examined and disposed of on its merits; this case was distinguished in Gamewell, etc., Co. *v.* Municipal Signal Co. 21 *id.* 116. As to disposing of the case on its merits, compare Blount *v.* Société Anomyme, 6 *id.* 335; Piedmont Cable Co. *v.* Pacific Cable R. Co., 15 *id.* 216. In Lockwood *v.* Wickes 36 U. S. App. 321; s. c. 75 Fed. Rep. 75, which was a suit to restrain the infringement of letters patent, the court held that while the section as amended was broad enough in its terms to confer a right of appeal in every case where an injunction is granted, refused or dissolved by an order or decree that is in its nature interlocutory, yet it was not probable that Congress intended to permit an appeal from an interlocutory decree rendered after a full hearing of a case on the merits in which an injunction was awarded and an order was made for an accounting, but that it seemed more reasonable to believe that an injunction, granted after a trial upon the merits, by a decree intended to settle the rights of the parties, is governed by the old rule that an appeal from such a decree can be prosecuted only after it becomes final, and that said section as amended was intended to confer the right of appeal in those cases only where, prior to a hearing on the merits, an injunction is granted, continued, refused or dissolved. For examples of appeals from orders granting or refusing preliminary injunctions, see Duplex Printing Press Co. *v.* Campbell P. P. & Mfg. Co., 37 U. S. App. 250; Thompson *v.* Nelson, *Ibid.* 478; Chicago Dollar Directory Co. *v.* Chicago Directory Co., 24 *id.* 525; Nat. Hoeing Mac. Co. *v.* Abbott, 77 Fed. Rep. 462. What is not such an interlocutory order or decree: see Boston & Albany R. Co. *v.* Pullman's Pal. Car Co., 5 U. S. App. 94: Robinson *v.* Wilmington, 8 *id.* 541; Drentzer *v.* Frankfort Land Co., 31 *id.* 83. For an order staying all further proceedings until the further order of the court may be appealed from, see Penna. Co. for Ins. on Lives, etc., *v.* Amer. Constrn. Co., 2 U. S. App. 606. When constitutional questions are involved in the interlocutory order granting an injunction the court of appeals has no jurisdiction: Town of Westerly *v.* Westerly Water Works, 76 Fed. Rep. 467. The finding of facts in the court below should not be reversed unless it is clearly wrong: Workingmen's Council *v.* U. S., 13 U. S. App. 426. A stay of the operation of an injunction pending the appeal is discretionary with the court; the Supreme Court cannot control it by mandamus: *In re* Haberman Mfg. Co., 147 U. S. 525. On an appeal from an interlocutory order the court should affirm or reverse the order appealed from, subject to the discretion of the court below, to modify or annul the order as the introduction of other facts may render necessary the application of other rules and principles in the further progress of

Compensation of Marshals, Clerks, etc.

§ 283. Sec. 9 provides that the marshals of the districts in which the circuit courts of appeals shall be held shall provide suitable rooms, and that the marshals, criers, clerks, bailiffs and messengers shall be allowed the same compensation for their services as are allowed in the circuit courts.

Remanding Cases.

§ 284. Sec. 10 provides that on an appeal from the circuit or district court to the Supreme Court, and on an appeal from the circuit court of appeals to the Supreme Court the cause shall be remanded by the Supreme Court to the proper circuit or district court for further proceedings; on an appeal to the circuit court of appeals, where its decision is final the cause shall be remanded to the circuit or district court for further proceedings.

Time for Appeal Limited; Allowance of Appeals.

§ 285. Sec. 11 provides that no appeal or writ of error by which any order, judgment or decree may be reviewed in the circuit court of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed.[1]

Provided, however, that in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit court of appeals. And all provisions of law regulating the methods and systems of review

the cause: Andrews *v.* Nat. Foundry & Pipe Works, 24 U. S. App. 81. Where in a patent suit an interlocutory decree adjudges the patent to be void or not to have been infringed, no appeal lies to the circuit court of appeals: Kilmer Mfg. Co. *v.* Griswold, 35 U. S. App. 246.

[1] The issuing of a writ of error within six months is a jurisdictional fact, and cannot be waived by agreement of the parties: Stephens *v.* Clark, 18 U. S. App. 584. If not taken within the prescribed time it will be dismissed: Hamilton *v.* Drisdale's Ex'rs., 2 *id.* 540. A writ of error will be dismissed if it is not actually issued by the clerk within six months; it is not sufficient that it has been allowed by a judge: U. S. *v.* Baxter, 10 *id.* 241. Where the last day falls on Sunday the writ cannot be issued thereafter: Johnson *v.* Meyers, 12 *id.* 220. The rules in respect to appeals and writs of error which govern the Supreme Court are applicable to the circuit court of appeals: West *v.* Irwin, 9 *id.* 547; Muhleuberg County *v.* Dyer, 31 *id.* 109.

shall apply to circuit courts of appeals, including all provisions for bonds or other securities to be required.

The judges have the same powers and duties as to the allowance of appeals or writs of error as belong to the justices or judges in respect of the existing courts of the United States respectively.[1]

Power to Issue Writs.

§ 286. Sec. 12 gives the court of appeals the powers specified in Revised Statutes 716, that is, to issue writs of *scire facias*, and all writs, not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.

Appeals from Courts of Indian Territory.

§ 287. Sec. 13 provided that appeals from the United States Court in the Indian Territory might be taken to the Supreme Court of the United States or to the circuit court of appeals in the eighth circuit, in the same manner as from circuit or district courts under this act. The act of March 1, 1895[2] created a court of appeals for Indian Territory, and provided that writs of error or appeal from the final decision of that court might be taken to the circuit court of appeals for the eighth circuit in the same manner and under the same regulations as appeals are taken from the United States circuit courts.[3]

Acts Repealed.

§ 288. Sec. 14 repeals Revised Statutes section 691 and section 3 of the act of February 16, 1875, and all acts inconsistent with this act.

[1] See N. P. R. Co. *v.* Anato, 144 U. S. 465.

[2] Act of March 1, 1895, ch. 145, § 11, 2 Supp. R. S. 397.

[3] This statute deprived the circuit court of appeals of the Eighth circuit of the power to hear appeals from the United States court in the Indian Territory: Scott *v.* Hamner, 72 Fed. Rep. 289.

The Act of Feb. 8, 1896, ch. 14, 29 Stat. L. 6, provided that the jurisdiction of the circuit court of appeals for the Eighth circuit should be extended to all suits at law or in equity then pending therein upon writ of error to or appeal from the United States court in the Indian Territory in all cases wherein such writ of error or appeal would have vested jurisdiction in said circuit court of appeals but for the act of March 1, 1895.

Appeals from Territorial Courts.

§ 289. Sec. 15. That the circuit court of appeals in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction by writ of error or appeal to review the judgments, orders and decrees of the supreme courts of the several territories as by this act they may have to review the judgments, orders and decrees of the district courts and circuit courts; and for that purpose the several territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits.[1]

[1] The circuit court of appeals has no jurisdiction in an appeal from the supreme court of a territory except in cases where its decision is made final by section 6 of this act, that is in admiralty cases, cases arising under the criminal, revenue, or patent laws of the United States, and cases between aliens and citizens of the United States, or between citizens of different states: Aztec Mining Co. *v.* Ripley, 151 U. S. 79.

The district court of Alaska is the supreme court of that territory; appeals may be taken from it to the court of appeals of the Ninth circuit, it having been assigned to that circuit by an order of the Supreme Court: Steamer Coquitlam *v.* U. S., 163 U. S. 346.

CHAPTER XII.

SUPREME COURT—ORGANIZATION AND SESSIONS.

Provisions for the Organization of the Supreme Court.

§ 290. The provisions of the Revised Statutes relating to the organization of the Supreme Court are as follows:

CONSTITUTION OF.—*Sec.* 673. The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.

PRECEDENCE OF JUSTICES.—*Sec.* 674. The associate justices shall have precedence according to the dates of their commissions, or when the commissions of two or more of them bear the same date, according to their ages.

VACANCY IN THE OFFICE OF CHIEF JUSTICE.—*Sec.* 675. In case of a vacancy in the office of Chief Justice, or of his inability to perform the duties and powers of his office, they shall devolve upon the associate justice who is first in precedence, until such disability is removed, or another Chief Justice is appointed and duly qualified. This provision shall apply to every associate justice who succeeds to the office of Chief Justice.

SALARIES OF JUDGES.—*Sec.* 676. The Chief Justice of the Supreme Court of the United States shall receive the sum of ten thousand five hundred dollars a year, and the justices thereof shall receive the sum of ten thousand dollars a year each, to be paid monthly.

APPOINTMENT OF CLERK, MARSHAL AND REPORTER.—*Sec.* 677. The Supreme Court shall have power to appoint a clerk[1] and a marshal of said court, and a reporter of its decisions.

APPOINTMENT OF DEPUTY CLERK.—*Sec.* 678. One or more

[1] The salary of the clerk shall not exceed $6,000 a year: Act of March 3, 1883, 1 Supp. R. S. 421, 22 Stat. L. 603.

deputies of the clerk of the Supreme Court may be appointed by the court on the application of the clerk, and he may be removed at the pleasure of the court. In case of the death of the clerk his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults and misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties on his official bond, shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

RECORDS OF THE COURT OF APPEALS.—*Sec.* 679. The records and proceedings of the court of appeals, appointed previous to the adoption of the present Constitution, shall be kept in the office of the clerk of the Supreme Court, who shall give copies thereof to any person requiring and paying for them in the manner provided by law for giving copies of the records and proceedings of the Supreme Court, and such copies shall have like faith and credit with all other proceedings of said court.

MARSHALS AND DUTY.—*Sec.* 680. The marshal is entitled to receive a salary at the rate of three thousand five hundred dollars a year. He shall attend the court at its sessions; shall serve and execute all process and orders issuing from it, or made by the Chief Justice or an associate justice in pursuance of law; and shall take charge of all property of the United States used by the court or its members. With the approval of the Chief Justice he may appoint assistants and messengers to attend the court, with the compensation allowed to officers of the House of Representatives of similar grade.

DUTY OF THE REPORTER.—*Sec.* 681. The reporter shall cause the decisions of the Supreme Court made during his office to be printed and published within eight months after they are made; and within the same time shall deliver three hundred copies of the volumes of said reports to the Secretary of the Interior. And he shall, in any year when he is so directed by the court, cause to be printed and published a second volume of said decisions, of which he shall deliver in like manner and time three hundred copies.

SALARY OF REPORTER AND PRICE OF REPORTS.—The reporter of the decisions of the Supreme Court of the United States shall be entitled to receive from the Treasury an annual salary of four thousand five hundred dollars when his report of said decisions constitutes one volume, and an additional sum of one thousand two hundred dollars when by direction of the court he causes to be printed and published in any year a second volume, and said reporter shall be annually entitled to clerk-hire in the sum of one thousand two hundred dollars, and to office rent, stationery, and contingent expenses in the sum of six hundred dollars, and an amount sufficient for the payment of said sums is hereby appropriated. *And provided further*, That the volumes of the decisions which said court shall hereafter pronounce shall be furnished by the reporter to the public at a sum not exceeding two dollars per volume, and the number of volumes now required to be delivered to the Secretary of the Interior shall be furnished by the reporter without any charge therefor.[1]

Section 683 as amended by the act of February 12, 1889,[2] provides for the disposition of the copies of said reports delivered to the Secretary of the Interior.

Without the means thus provided by Congress, the Supreme Court could not have been properly constituted or organized. For to constitute a court in the sense used in the Constitution, there should not only be a judge or judges to hear and determine causes, but clerks to record and attest its acts and decisions, and ministerial officers to execute its commands and judgments and secure due order in its proceedings. Judicial power signifies the power with which courts are clothed, and this embraces not only the power to try and determine, but to execute its orders and judgments.

Under these provisions the Supreme Court was duly constituted, and it may take original cognizance of the cases specified in the Constitution. But we shall consider its jurisdiction more particularly in a subsequent chapter.

[1] Rev. Stat. § 682, as amended by Act of August 5, 1882, ch. 389, par. 10, 1 Supp. R. S. 374, 22 Stat. L. 219.

[2] Act of Feb. 12, 1889, ch. 135, 25 Stat. L. 661, 1 Supp. R. S. 642.

Tenure of Office of the Judges.

§ 291. Having set out the statutes providing for the organization of the Supreme Court, and shown the mode of appointment of the judges, it may be well to consider briefly the tenure by which the judges hold their offices.

We have noticed that the Constitution provides that "the judges of both the Supreme Court and inferior courts shall hold their offices during good behavior."

The question as to the policy and wisdom of a permanent tenure of office of judges received much attention at the time of the formation of the Constitution, and it has been the subject of discussion ever since that time. Many of the state constitutions have made these offices elective, and for a short term; and it can hardly be affirmed, in the light of experience under this mode of securing judicial officers, that the judges of the state courts have not generally maintained a character for ability and integrity equal to that secured by appointment and a holding for life or during good behavior. Notwithstanding many objections urged by speculative theorists and political philosophers, it is believed that judges selected by popular election and for short terms have generally given satisfaction; and there is certainly one advantage enjoyed by this mode of selecting judges as well as other officers, and that is that if they prove incompetent or unworthy, there is an oppertunity for removal without much delay. But owing to the complicated character of our national government, and considering that the judiciary department is a co-ordinate and independent one, there are some important reasons why the judges should be appointed in the manner provided by the Constitution, and that the tenure of the office should continue during good behavior. This question was much discussed before the adoption of the Constitution. A contemporaneous writer of rare ability said: "The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright and impar-

tial administration of the laws. Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or the wealth of society; and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty. . . . Upon the whole, there can be no doubt that the convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of judicial offices in point of duration; and that, so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government."[1]

Terms of the Supreme Court.

§ 292. The provisions of the statute relating to the terms of the Supreme Court require that it shall hold one term annually at the seat of government, commencing on the second Monday of October, and such adjourned or special terms as it may find necessary for the despatch of business; and that "suits, proceedings, recognizances and processes pending in or returnable to said court shall be tried, heard and proceeded with as if the time of holding said session had not been altered;" that if at any session of the court a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn it from day to day for twenty days after the appointed time, unless before that time a quorum shall attend; that if a quorum does not attend within that time, the business of the court shall be

[1] The Federalist, No. 78. The question here discussed may be found presented in every light in 1 Kent's Com. (13th ed. by Holmes), 291 *seq.*, and 2 Story's Const. (4th ed. by Cooley), 1600 *seq.*

continued over till the next appointed session; and that if, during a term, after a quorum has assembled, less than a quorum attend on any day, the justices attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

They further provide that the justices attending at any term when less than a quorum is present may, within the twenty days mentioned, "make all necessary orders touching any suit, proceeding or process depending in or returned to the court preparatory to the hearing, trial and decision thereof."[1]

[1] See Rev. Stat. §§ 684, 685, 686.

CHAPTER XIII.

PROCEDURE IN CASES OF ORIGINAL JURISDICTION.

Rules of Practice.

§ 293. Having treated of the constitution and organization of the Supreme Court, we shall now proceed to consider its original jurisdiction, and the pleadings, practice and procedure therein. It may be observed that there are no statutes or general rules of the court that specifically point out the practice or mode of procedure in the Supreme Court, as a court of original jurisdiction, or that prescribe the forms of pleadings therein. But a general statutory provision requires that "all writs and process issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof;" that "those issuing from the Supreme Court or a circuit court shall bear the teste of the Chief Justice of the United States, or when that office is vacant, of the associate justice next in precedence;"[1] and that "all process issued from the courts of the United States shall bear teste from the day of such issue."[2]

It is further declared by a general rule of the court that "this court consider the practice of the courts of the King's Bench and of Chancery in England as affording outlines for the practice of this court; and they will, from time to time, make such alterations therein as circumstances may render necessary."[3] The practice of chancery referred to is the practice of the High Court of Chancery of England. This practice would undoubt-

[1] Rev. Stat. § 911. A summons or notice must be under the seal of the court and signed by the clerk: Peaslee *v.* Haberstro, 15 Blatch. 472; Dwight *v.* Merritt, 4 Fed. Rep. 614.

[2] Rev. Stat. § 912. A writ of error bearing the teste of the clerk only, and not that of the Chief Justice of the Supreme Court, is void: Wells *v.* McGregor, 13 Wall. 188.

[3] Gen. Rule 3.

tedly regulate the procedure in the federal courts so far as it would be applicable, not in all cases as positive rules, but as furnishing just analogies relating to the practice in the absence of rules of court or statutes prescribing the practice, and in cases where the rules of the English High Court of Chancery would not be strictly applicable.[1] The rules of this court further provide that all process of the court shall be in the name of the President of the United States; that all process in common law or in equity issued against a state shall be served on the governor or chief magistrate and attorney-general of such state; that the process of subpœna issuing out of this court in any suit in equity must be served on the defendant sixty days before the return day of such process; that if, after due service of the same, the defendant does not appear at the return day contained therein, the plaintiff is at liberty to proceed *ex parte;* and that all motions must be in writing.[2]

For some time after the adoption of the Constitution and the organization of this court, it was a question much discussed whether, without an act of Congress regulating the practice and mode of procedure, this court could exercise any original jurisdiction in cases where the forms and modes of procedure of the English High Court of Chancery were not applicable. This question was first presented to the court in the case of Florida *v.* Georgia.[3] In this case the state of Florida filed a bill in this court against the state of Georgia, to establish a boundary between them, thereby invoking the aid of the original jurisdiction of the court. The Attorney-General filed a motion therein for leave to appear and plead on behalf of the United States, in such time and form as the court should order.

The case was a novel one, there being nothing in the practice or precedents of the English courts furnishing any guide, and but imperfect analogies as to the proper forms and practice in such a case. It was, however, determined that, although Congress might prescribe the modes and forms of proceeding for this court, yet this was not essential, and having failed so to do, the

[1] Equity Rule 90; Boyle *v.* Zacherie, 6 Pet. 648; Poultney *v.* La Fayette, 12 *id.* 472; Rhode Island *v.* Massachusetts, 14 *id.* 210; Florida *v.* Georgia, 17 How. 478.

[2] Gen. Rules 5, 6.

[3] 17 How. 478 (1854).

court should not on this account be deprived of jurisdiction; that it was the duty of the court under such circumstances to prescribe these to accomplish the ends for which the jurisdiction was given by the Constitution; and that, if the established forms and usages of law and equity afforded no precedents for a case within the jurisdiction of the court, it was the further duty of the court to mould and adopt the requisite forms so as to attain the ends of justice, disregarding nice technicalities.[1]

The general rules of pleading, practice and procedure applicable to circuit courts of the United States, which we have already considered, would be equally applicable to the Supreme Court.

Procedure in Equity; Essentials of a Bill.

§ 294. A party desiring to invoke the original jurisdiction of the Supreme Court on its equity side should first prepare his bill in the form required by the chancery practice in England, subject to such changes as have been made by the rules of this court and acts of Congress. Under the rules of this court he may omit the part usually called the confederacy clause, and the clauses commonly called the charging part of the bill; also what is generally known as the jurisdiction clause, that is, the clause "that the acts complained of are contrary to equity, and that the plaintiff is without any remedy at law." And he "may, in the narrative or stating part of his bill, state and avoid by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defence or excuse to the case made by the plaintiff;" and the prayer of the bill must ask for the special relief to which the plaintiff supposes himself entitled. The bill must also contain a prayer for general relief; and if an injunction or writ of *ne exeat regno*, or any other special order pending the suit, is required, it must be specially asked for.[2]

[1] See also Grayson *v.* Virginia, 3 Dall. 339; Huger *v.* South Carolina, *Ibid.* 371; New York *v.* Connecticut, 4 *id.* 1; New Jersey *v.* New York, 5 Pet. 284; Rhode Island *v.* Massachusetts, 12 *id.* 657; s. c., 15 *id.* 233; Taylor *v.* Salmon, 4 Mylne & Craig, 141; Boyle *v.* Zacherie, 6 Pet. 648; Pennsylvania *v.* Quicksilver Co., 10 Wall. 553.

[2] Equity Rule 21.

The prayer for process of subpœna must also set forth the names of all the defendants named in the introductory part, and if any of them are known to be infants or under guardianship, it should state this fact, that the court may be able to make such orders on the return of the subpœna as justice may require. But it is sufficient to ask for an injunction or a writ of *ne exeat regno*, or any other special order, pending the suit, in the prayer for relief, without repeating the same in the prayer for process.[1]

It is further required that "Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that upon the instruction given to him and the case laid before him there is good ground for the suit in the manner in which it is framed."[2]

Notwithstanding that the formal jurisdiction clause may be omitted from a bill, it is essential that it should show facts giving the court jurisdiction. The original jurisdiction of the court is quite limited, depending in all cases upon the citizenship or character of the parties, and not upon the subject-matter or the value of the matter in controversy. The required citizenship or character of the parties should of course be set forth in the bill in order to show the jurisdiction of the court.[3]

When a State is a Necessary Party.

§ 295. Where the jurisdiction of the court depends upon the fact that a state is a party, it must appear from the bill that it is so in fact, and it is not sufficient that it be made to appear that the state is indirectly interested in the controversy and may be consequentially affected by the result. The state must in such cases be made a party on the record, or objection may be taken by demurrer on that ground.[4] But it is sufficient that the state be substantially a party, as where the bill is filed by the governor

[1] Equity Rule 23.

[2] Equity Rule 24. Where a bill for an injunction was filed without the proper signature of counsel it was ordered to be taken from the files; but on being amended in this respect it was, on motion, reinstated, and the injunction granted as on a bill and motion *de novo*: Roach *v.* Hulings, 5 Cr. (C. C.) 637.

[3] Rev. Stat. § 687; Equity Rules 20 and 21; Georgia *v.* Brailsford, 2 Dall. 405; Georgia *v.* Madrazzo, 1 Pet. 110.

[4] Fowler *v.* Lindsey, 3 Dall. 411; Governor of Georgia *v.* Madrazzo, 1 Pet. 110; Osborne *v.* Bank of U. S., 9 Wh. 738; Bank of U. S. *v.* Planters' Bank, *Ibid.* 904.

of a state on its behalf,[1] or where the claim made in a libel in admiralty is upon the governor as such, and officially, and not against him personally.[2]

If the suit is by the state against a corporation, it should be shown by the bill or declaration that the corporation is a citizen of another state, that is, incorporated by or organized under the laws of some other state, naming it; and it is not sufficient merely to aver that the corporation defendant is a body politic by the laws of another state and doing business within it.[3] Jurisdictional facts should be clearly averred and not left for inference.[4] Every bill must contain in itself sufficient matter of fact, both as to jurisdiction and the subject of the claim made, to maintain the case of the plaintiff.[5]

Frame of Bills; Interrogatories.

§ 296. The introductory part of a bill should usually contain the names, places of abode, and a statement of the citizenship of all the parties, plaintiffs and defendants. Where, however, a state is a party, it would not be necessary or practicable to state the abode or citizenship of the state, but a statement of the fact that it is a state would be sufficient. The general principles of equity pleading, practice and procedure are applicable to all the federal courts having equity jurisdiction.[6]

It is not necessary to interrogate the defendant, specially and particularly, upon any statement in the bill, unless it is desirable to do so to obtain a discovery.[7] If interrogatories are inserted, they should be numbered, consecutively 1, 2, 3, etc. And the interrogatories which either of the defendants are required to answer should be specified in a note at the foot of the bill, as follows: "The defendant A. B. [or others named] is required to answer the interrogatories numbered respectively 1, 2, 3," etc. And if the complainant in his bill waives an answer under oath,

[1] Georgia *v.* Brailsford, 2 Dall. 405.

[2] Governor of Georgia *v.* Madrazzo, 1 Pet. 110.

[3] Pennsylvania *v.* Quicksilver Co., 10 Wall. 553.

[4] Railway *v.* Ramsey, 22 Wall. 322; Virginia *v.* West Virginia, 11 *id.* 39. See also Bank of U. S. *v.* Planters' Bank, 9 Wh. 904; Bank of Kentucky *v.* Wister, 2 Pet. 321; The Cherokee Nation *v.* Georgia, 5 *id.* 1.

[5] Harrison *v.* Nixon, 9 Pet. 483.

[6] Equity Rule 20. See also Fowler *v.* Miller, 3 Dall. 411.

[7] Amended Equity Rule 40.

or only requires an answer under oath in regard to certain specified interrogatories, the answer of the defendant may be under oath to the whole bill, but it will not be evidence in his favor, except as to such part thereof as shall be directly responsive to such interrogatories, unless the cause is set down for a hearing on the bill and answer only.[1]

The answer may in such cases also be used as an affidavit, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; and an answer under oath to certain interrogatories will not prevent the defendant from becoming a witness in his own behalf, as provided by law.[2]

It is further prescribed that where interrogatories are used in a bill they shall be preceded by the following form: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, etc.

"2. Whether, etc."[3]

Leave to File a Bill; Practice; Subpœna.

§ 297. The practice of obtaining leave to file a bill in this court is quite anomalous; but it seems common, if not universal, although there is no statute or rule of court upon the subject. The usual course is to file a motion asking leave to file the bill, which is generally heard *ex parte* on a regular motion day.[4] Where, however, the bill prayed an injunction to restrain the President of the United States from executing a law of Congress, it was held proper, under the peculiar circumstances of the case, to hear an argument against the motion for leave to file the bill.[5] If the leave to file a bill is granted, the clerk will

[1] Equity Rule 41 and amendment.

[2] Rev. Stat. § 858; Equity Rule 41, as amended.

[3] Equity Rule 43.

[4] Georgia *v.* Grant, 6 Wall. 241.

[5] Mississippi *v.* Johnson, 4 Wall. 475. See also Poultney *v.* La Fayette, 12 Pet. 472.

issue a subpœna; but an order to issue the subpœna should accompany the granting of leave to file the bill, and the motion for leave to file the bill should ask for the order for the proper process. The order may be suspended or rescinded by any judge of the court, upon special cause shown therefor.[1]

Subsequent Proceedings.

§ 298. It has been determined that if the state shall fail to appear after due service of process upon her, no coercive measures will be allowed to compel an appearance, but the complainant or plaintiff will be allowed to proceed *ex parte;*[2] and he may move for commissions to issue to take the depositions of witnesses; or he may move the trial of the cause on oral testimony, in the usual way, as soon as the cause is reached for trial, or as soon as permitted by the rules or orders of the court. It may be observed that the Supreme Court, in the exercise of its original jurisdiction, has the right to prescribe rules of practice and procedure for itself or the inferior federal courts, and to make such deviations from the English common law and admiralty and chancery practice as are necessary to adapt the process and procedure of the court to the peculiar circumstances of cases arising in this country, limited only by such alterations or regulations as Congress may provide. In the exercise of this authority, the court framed General Rule 5, prescribing the persons on whom original process should be served, and the time of service, and the proceedings on a failure of appearance; and in the case last cited, on the failure of the defendant to appear after due service of process, it was, on motion of the complainant, ordered and decreed that the complainant be at liberty to proceed *ex parte;* and that unless the defendant, after being served with a copy of the order and decree sixty days before the next following term of the court, should appear before said term and answer the bill, the court would proceed to hear the cause on the part of the complainant, and to decree on the matter of said bill. Within the time required by the order and decree of the court, the state of New York appeared in the case by its

[1] Equity Rule 5.

[2] Massachusetts *v.* Rhode Island, 12 Pet. 755; Grayson *v.* Virginia, 3 Dall. 320; New Jersey *v.* New York, 5 Pet. 284.

attorney-general and filed a demurrer to the bill, and the question was raised whether this was a compliance with the order of the court requiring the defendant to answer. The court held that in a legal sense a demurrer was an answer, though not so in a technical sense, and that it was a sufficient compliance with the order.[1]

Proceedings on the Part of the Defendant.

§ 299. If the defendant desires to appear and defend the cause, or for any purpose connected with it, he should at or before the return day of the process, which, as we have seen, must be at least sixty days after its service, cause an appearance to be entered by the clerk, either personally or by his solicitor, and for that purpose should file with him a precipe for an appearance. The appearance may be general, or special for some particular purpose.

When a Bill will be Dismissed on Motion.

§ 300. We have noticed that jurisdictional facts should be clearly set forth in the bill or declaration. A failure to do so would be fatal on a motion to dismiss or a demurrer for want of jurisdiction. In the case of Rhode Island *v.* Massachusetts,[2] a motion was made to dismiss on the ground of a want of jurisdiction, which the court entertained although made after a plea in bar had been filed. But the court overruled the motion, holding they had jurisdiction of the parties and of the subject-matter.[3]

The general principle in relation to the special limited original jurisdiction of this court is that the court will not take cognizance of a cause where its authority to do so is not manifest from the record, and the court will take notice of this when it is apparent, whether objection for want of jurisdiction is made or not.

A motion to dismiss a cause, pending in the courts of the United States, is not analogous to a plea to the jurisdiction of a court of common law or equity in England. There, owing to the peculiar organization and powers of the courts, the rule is

[1] New Jersey *v.* New York, 6 Pet. 323.

[2] 12 Pet. 657.

[3] See also United States *v.* Hughes, 11 How. 552; Georgia *v.* Stanton, 6 Wall. 50; Cohens *v.* Virginia, 6 Wh. 264; Harding *v.* Handy, 11 *id.* 103; Harrison *v.* Nixon, 9 Pet. 483.

that a party claiming an exemption from the jurisdiction of the court must set out the reasons by a special plea in abatement, and show that some other court has the exclusive cognizance of the case, and must point out to the court where the case belongs. In order to quash a writ or dismiss a bill in England, for want of jurisdiction, the plaintiff must give a better one, and he can never put in a second plea to the jurisdiction of the court. But in the federal courts, irregularity of process or defective service of the same is waived by an appearance and pleading to the issue.[1] And when the objection is that the court has no jurisdiction over the parties or the subject-matter, the defendant need not give the plaintiff a better writ or bill.

Demurrer for want of Jurisdiction.

§ 301. A demurrer to a bill or declaration operates as an admission, for the purpose of the demurrer only, that all the averments which are properly pleaded are true. Its purpose is to bring before the court the question of the right to maintain the suit, admitting the allegations to be true; and the court will not inquire *aliunde* what facts might or might not defeat it, as this is the office of a plea or answer.[2]

It is manifest that if there is a want of allegations showing that the parties to the suit are the necessary and proper parties to give the court jurisdiction, this would be good ground for demurrer, and for a dismissal; and the proper practice would be to demur, although advantage of the defect might be taken afterwards by motion, plea or answer.[3]

So far as our present purpose is concerned it will be necessary to consider the demurrer only in relation to its office where there is a want of proper allegations in a bill or declaration as to the character of the parties, as it is this which gives the court original jurisdiction. We should, however, observe that even where the controversy is between states, the court will not take cogniz-

[1] Voorhees *v.* Bank of the U. S., 10 Pet. 449; Toland *v.* Sprague, 12 *id.* 300; Knox *v.* Summers, 3 Cr. 496; Pollard *v.* Dwight, 4 *id.* 421.

[2] Griffing *v.* Gibb, 2 Black 519; Foot *v.* Link, 5 McLean 616; Ocean Insurance Co. *v.* Fields, 2 Story 59; Woodworth *v.* Edwards, 3 Woodb. & M. 120; Bayerque *v.* Cohen, 1 McAll 113; 1 Dan. Ch. Pl. 543.

[3] Jackson *v.* Ashton, 8 Pet. 148; Wood *v.* Wagnon, 2 Cr. 9; Ross *v.* Duvall, 13 Pet. 45; Gaylords *v.* Kelshaw, 1 Wall. 81.

ance of a controversy which relates solely to matters of a political character; and a bill which asks for relief in such a case would be subject to a demurrer.[1] But where the political question involved, as that of the right of sovereignty and jurisdiction of a state over disputed territory, is merely incidental to the main question to be determined, as in case of a bill to settle the question of a disputed boundary between states, the question is not a political one, so as to oust the jurisdiction of the court.[2]

In Georgia *v.* Stanton the objection to the jurisdiction of the court was taken by motion, but it illustrates the general doctrine equally as well as if it had been raised by a demurrer. The court determined that the bill, both in the body of it and in the prayer for relief, called for the judgment of the court upon political questions; that the rights for the protection of which the authority of the court was invoked were not those of a private character, but related to those of sovereignty and political jurisdiction; and that the court had no jurisdiction over the subject-matter presented by the bill.[3]

Certificate of Counsel and Affidavit Required.

§ 302. It is further provided by rule that "no demurrer or plea shall be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by affidavit of the defendant that it is not interposed for delay, and if a plea, that it is true in point of fact."

Office of a Plea.

§ 303. The office of a plea is to furnish some fact or facts not apparent on the bill, but which, if they had been therein stated, would have rendered the bill demurrable. The plea should contain averments which, if true, would defeat the relief asked for by the plaintiff. It is allowed in order to save expense and to protect the defendant from a discovery which ought not to be required under the facts and the circumstances of the case; and it enables the court to decide upon the issues, taking the bill to be true so far as it is not contradicted or qualified by the plea.

[1] State of Georgia *v.* Stanton, 6 Wall. 50; The Cherokee Nation *v.* Georgia, 5 Pet. 1.

[2] Rhode Island *v.* Massachusetts, 12 Pet. 657; Florida *v.* Georgia, 17 How. 478; Cherokee Nation *v.* Georgia, 5 Pet. 1.

[3] 6 Wall. 50. See also Mississippi *v.* Johnson, 4 *id.* 475.

An illustration of the office of plea might be found in case of a bill filed in this court by a consul against a citizen. If it should be averred in the bill that the complainant was a consul, which would be an essential jurisdictional fact to be shown, when in fact he was not a consul, the objection on this account could not be taken by demurrer, because a demurrer admits the facts well pleaded. The question could in such a case be raised by a plea denying that the plaintiff was in fact a consul. The jurisdictional question would thus be presented and determined by the judgment of the court on the single issue whether the plaintiff was or was not a consul. This would be a plea to the jurisdiction of the court in abatement, and not in bar of another action in another court.[1] Another appropriate case for a plea would be where there was another suit pending for the same matter, where it would also be in abatement.[2]

It is sometimes necessary to accompany a plea with an answer; especially is this required in certain cases by the rules of practice prescribed for the courts of equity of the United States. Equity Rule 32 provides that "in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded."[3]

It is not, however, within the proper scope of this treatise to consider fully the various kinds of pleadings at law and in equity; and the reader is referred to those special treatises on these subjects where these matters are discussed and illustrated.

We may remark in this connection that by the general rules of equity practice, the plea was required to be verified by affidavit, and under a rule of this court a plea as well as a demurrer is not only required to be supported by the affidavit of the defendant that it is not interposed for delay, and in case of a plea,

[1] 1 Dan. Ch. Pl. (4 Am. ed. Perkins) 626; Jones *v.* League, 18 How. 76.

[2] 2 Dan. Ch. Pl. (4 Am. ed.) 633; Mathews *v.* Robers, 1 Green, Ch. 338; Way *v.* Bagshaw, C. E. Green (16 N. J.) 213; Cleveland, etc., R. Co. *v.* Erie, 27 Pa. St. 380; Mann *v.* Richardson, 21 Pick. 259.

[3] 1 Dan. Ch. Pl. (4 Am. ed.) 614; Story's Eq. Pl. § 681, *et seq.*; Syms *v.* Lyle, 4 Wash. (C. C.) 303; Livingston *v.* Story, 9 Pet. 632; s. c., 11 *id.* 352; De Sobry *v.* Nicholson, 3 Wall. 420; Heath *v.* Erie R. Co., 8 Blatch. 347.

that it is in point of fact true, but the certificate of counsel is required that in his opinion it is well founded in point of law.[1]

Setting Down for a Hearing.

§ 304. To set down a demurrer or plea for a hearing is to enter the title of the cause in the list of matters ready to come on for a hearing at the next rule day of the court, specifying the matter to be heard, and of which the opposite party must take notice. The entry may be made as a matter of course. On the argument of a plea it has been held that the allegations of the bill may be taken less strongly against the plaintiff than they would be on the argument of a demurrer.[2] "If a plea is supported by an answer, upon the argument of the plea the answer may be read to counterprove the plea; and if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled or ordered to stand for an answer only." Where a defendant answered to an original bill, which was afterwards amended, and the defendant put in a plea to the amended bill, the plaintiff was permitted to read the answer to the original bill, to counterprove the plea to the amended bill.[3]

On the argument of a plea the general rule is that the averments of the bill must be taken as true, except as to those denied by the plea, and by the answer if one is filed in support of the plea; and if set down by the plaintiff for a hearing, without a reply, the averments contained in it must be treated as true.[4] So the general rule is that no plea or demurrer can be held bad and overruled upon the argument merely because it does not cover so much of the bill as it might have extended to.[5] Nor shall it be overruled merely because the answer of the defendant may extend to some part of the same matter as is covered by it.[6]

Where the Plea or Demurrer is Overruled.

§ 305. If, upon the hearing of a plea or demurrer, it is overruled, the plaintiff, on general principles, is entitled to his costs up to that time, unless the court is satisfied that he had good

[1] Equity Rule 31.

[2] Rumbold *v.* Forteath, 2 Jur. N. S. 686.

[3] 1 Dan. Ch. Pl. (4th Am. ed.) 695.

[4] Borgandus *v.* Trinity Church, 4 Paige 178; Lawrence *v.* Pool, 2 Sand. S. C. 540; Gallagher *v.* Roberts, 1 Wash. (C. C.) 320; Rowley *v.* Williams, 5 Wis. 151; Davison *v.* Johnson, 1 C. E. Green (16 N. J. Eq.) 112.

[5] Equity Rule 36.

[6] Equity Rule 37.

ground, in point of law or fact, to interpose the same, and that it was not put in vexatiously or for the purpose of delaying the cause;[1] and the court may, in accordance with the general procedure in such cases, order the defendant to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day or at such other time as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof the bill may, if so ordered, be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.[2]

Where the Plea or Demurrer is Allowed.

§ 306. If a plea or demurrer is allowed upon the hearing, the court may allow the plaintiff, on motion, to amend the bill upon such terms as appear reasonable, but the defendant is entitled, as we have stated, to his costs.[3] In case of a failure of the plaintiff to reply to a plea, or to set down the same for a hearing at the proper time, he may be considered as admitting the truth and sufficiency of it, and his bill must be dismissed of course, unless the court shall allow him further time to reply or to set the plea down for argument.[4] But the dismissal of a bill in such a case would be no bar to another suit.

[1] Equity Rule 34.

[2] *Ibid.*; Bank of U. S. *v.* White, 8 Pet. 262.

[3] Equity Rule 35.

[4] Hughes *v.* United States, 4 Wall. 232.

CHAPTER XIV.

SUPREME COURT—APPELLATE JURISDICTION.

Appeals from Circuit and District Courts.

§ 307. Appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:[1]

JURISDICTIONAL QUESTION.—In any case in which the jurisdiction of the court is in issue; in such case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

The word "jurisdiction" means the jurisdiction of the circuit or district court over the subject matter of the suit and the parties, and does not refer to the question whether the suit should be brought at law or in equity.[2]

The question of jurisdiction must be certified plainly before the Supreme Court can take jurisdiction: the certificate from the court below is absolutely necessary.[3] The certificate must be granted at the term at which the decree or judgment is

[1] Circuit court of appeals act: Act of March 3, 1891, ch. 517, § 5, 1 Supp. R. S. 901. See *ante* chapter on circuit courts of appeals. The Supreme Court will decide whether it has jurisdiction, without interference from any other court. A circuit court cannot restrain a party from applying for a writ of error nor order the writ to be dismissed after it has been granted: *In re* Chetwood, 165 U. S. 443.

[2] U. S. *v.* Swan, 65 Fed. Rep. 647; *In re* Mudsill Min. Co., 31 U. S. App. 112.

[3] Van Wagenen *v.* Sewall, 160 U. S. 369; Maynard *v.* Hecht, 151 *id.* 324; Moran *v.* Hagerman, *Ibid.* 329; Colvin *v.* Jacksonville, 157 *id.* 368; Davis *v.* Geissler, 162 *id.* 290; Ansbew *v.* U. S., 159 *id.* 695. See also Amer. Sugar Refin. Co. *v.* Johnson, 13 U. S. App. 681. As to what is a sufficient certificate, see *In re* Lehigh Min. & Mfg. Co., 156 U. S. 322; Shields *v.* Coleman, 157 *id.* 168; Carey *v.* Houston & Tex. Cent. R. Co., 150 *id.* 170; Interior Constrn. Co. *v.* Gibney, 160 *id.* 217; Chappell *v.* U. S., *Ibid.* 499.

entered.[1] After the Supreme Court has passed upon the question of jurisdiction the question cannot again be raised in the circuit court of appeals.[2] If a case involves the constitutionality of a statute the Supreme Court has jurisdiction of all questions involved, including that of jurisdiction, though it has not been certified.[3]

The act does not give the defeated party a right to have his case finally determined on the merits both in the circuit court of appeals and in the Supreme Court.[4] After final judgment in the circuit court a party must elect whether to go to the Supreme Court on the question of jurisdiction alone, or to the circuit court of appeals on the whole case; if he elects the latter course that court has power to decide the question of jurisdiction.[5] But if one party takes the case to the Supreme Court on the question of jurisdiction, the other party is not precluded from going to the circuit court of appeals on the merits; the latter court may determine whether or not it will hear the appeal until the Supreme Court has decided the question of jurisdiction.[6] In U. S. *v.* Jahn,[7] the Supreme Court, construing the circuit court of appeals act, said: "Giving the act a reasonable construction, taken as a whole, we conclude: (1) If the jurisdiction of the circuit court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court. (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it. (3) If the question of jurisdiction is in issue,

[1] Colvin *v.* Jacksonville, 158 U. S. 456.

[2] Nashua & L. R. Co. *v.* Bost. & L. R. Corp'n, 5 U. S. App. 97.

[3] Scott *v.* Donald, 165 U. S. 58; Chappell *v.* U. S., 160 *id.* 499

[4] Robinson *v.* Caldwell, 165 U. S. 359; Chic., M. & St. P. R. Co. *v.* Evans, 19 U. S. App. 233.

[5] Rust *v.* United Waterworks Co., 70 Fed. Rep. 129; s. c., 36 U. S. App. 167; McLish *v.* Roff, 141 U. S. 661; Chic., St. P., M. & O. R. Co. *v.* Roberts, *Ibid.* 690; Schunk *v.* Moline, M. & S. Co., 147 *id.* 500; Barling *v.* Bank of British Nth. Am., 7 U. S. App. 194.

[6] North Pac. R. Co. *v.* Glaspell, 4 U. S. App. 238.

[7] 155 U. S. 109, 114.

and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court. (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he had recovered, he may also carry the case to the circuit court of appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently, if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits."

PRIZES CAUSES.—From the final sentence and decrees in prize causes it is provided by section 695 of the Revised Statutes as follows: "An appeal shall be allowed to the Supreme Court from all final decrees of any district court in prize causes, where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, and shall be allowed without reference to the value of the matter in dispute on the certificate of the district judge that the adjudication involves a question of general importance. And the Supreme Court shall hear and determine such appeals, and shall always be open for the entry thereof."

Under the provisions of the statutes for allowing writs of error and appeals the decision must be final and dispose of the whole matter so far as the appellant is concerned. Where the United States filed several libels for condemnation, as prize of war, of a large quantity of cotton and other captured property, and on motion these were consolidated and various claims were interposed in the consolidated suit for portions of the libelled property, among which was one by parties who denied the validity of the capture and insisted on the title and the right to a portion of the cotton, but upon the hearing in the district court an order was made dismissing the claims with costs, and the claimants appealed therefrom, it was held, upon a motion to dis-

miss the appeal in this court on the ground that the decree was not final, that, so far as these appellants and the United States were concerned, it was a final judgment, leaving nothing to be litigated between them, and that the court had jurisdiction thereof.[1]

The statute provides that: "Appeals in prize causes shall be made within thirty days after the rendering of the decree appealed from, unless the court previously extends the time, for cause shown in the particular case; *provided*, that the Supreme Court may, if in its judgment the purposes of justice require it, allow an appeal in any prize cause, if it appears that any notice of appeal, or intention to appeal, was filed with the clerk of thedistrict court within thirty days next after the rendition of the final decree therein."[2]

The statute further provides that "appeals from the circuit courts, and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error."[3]

CAPITAL CRIME.—In cases of conviction of a capital crime.[4]

By Act of February 6, 1889,[5] in all cases of conviction of crime

[1] Withenbury *v.* United States, 5 Wall. 819; The Admiral, 3 *id.* 603. Where this court will remand a cause to the district court, see United States *v.* Weed, 6 Wall. 62; The Watchful, *Ibid.* 91. A technical objection will not be entertained in this court, where it is not raised in the court below: Jecker *v.* Montgomery, 18 How. 111.

[2] Rev. Stat. § 1009; The Neustra Senora de Regla, 17 Wall. 29.

[3] Rev. Stat. § 1012; Yeaton *v.* Lenox, 7 Pet. 220; The Protector, 11 Wall. 82.

[4] The act originally read "capital or otherwise infamous" crime, but was amended by the Act of Jan 20, 1897, 29 Stat. L. 492, the amendment not to apply to pending cases: "Infamous crime" defined in Stokes *v.* U. S., 23 U. S. App. 289. The judgment must be reviewed by writ of error, and only questions of law properly presented will be considered: Bucklin *v.* U. S., 159 U. S. 680. A writ of error does not lie in behalf of the United States in a criminal case: U. S. *v.* Sanges, 144 *id.* 310. Any justice of the Supreme Court may grant a *supersedeas* and direct the prisoner to be admitted to bail and fix the amount of bail; if the judge of the court before whom the prisoner was tried refuses to obey the order, he may be compelled by mandamus from the Supreme Court to do so: Hudson *v.* Parker, 156 U. S. 277. Circuit courts of appeals have no jurisdiction in capital cases: Folsom *v.* U. S., 160 U. S. 121.

[5] Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. L. 655, 1 Supp. R. S. 639.

the punishment for which is death, tried before any United States court, the final judgment of such court against the respondent shall, upon his application, be re-examined, reversed or affirmed by the Supreme Court, and the proceedings are regulated.

CONSTITUTIONAL QUESTION.—In any case that involves the construction or application of the Constitution of the United States.[1]

CONSTITUTIONALITY OF ACTS OF CONGRESS AND VALIDITY OF TREATIES.—In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

CONSTITUTIONALITY OF STATE LAWS.—In any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

Appeals from the Circuit Courts of Appeals.

§ 308. An appeal lies to the Supreme Court from the circuit court of appeals, in all cases, where the decision of that court is not made final,[2] where the matter in controversy exceeds one thousand dollars besides costs.

TIME OF APPEAL.—All such appeals and writs of error must be brought within one year after the entry of the order, judgment or decree sought to be reviewed.[3]

[1] The constitutional right must have been claimed in the court below: Cornell *v.* Green, 163 U. S. 75; Morrison *v.* Watson, 154 *id.* 111. Where the constitutionality of an act is involved, the Supreme Court has jurisdiction of the entire case: Horner *v.* U. S., 143 *id.* 570. A party may appeal to the Supreme Court on a constitutional question and also to the court of appeals on other questions: McLish *v.* Roff, 141 *id.* 661; Pullman's Pal. Car Co. *v.* Centr. Trans. Co., 76 Fed. Rep. 401. The question whether due force and effect has been given to a judgment of another state is not a constitutional question; it should be taken to the circuit court of appeals: Merritt *v.* Amer. Steel Barge Co., 75 Fed. Rep. 813. See also Scranton *v.* Wheeler, 16 U. S. App. 152.

[2] Act of March 3, 1891, *supra*. The cases where the decision of the circuit court of appeals is made final are those where the jurisdiction is dependent upon the diverse citizenship of the parties, admiralty cases, and cases arising under the patent, revenue and criminal laws: *Ibid.*

[3] Act of March 3, 1891.

CERTIFIED CASES AND CERTIORARI.—The Supreme Court also has jurisdiction in cases certified to it by the circuit court of appeals, and may order any case the decision of which is made final in that court to be brought before it by certiorari or otherwise.[1]

Appeals from Territorial Courts.

§ 309. The Supreme Court has jurisdiction of appeals from the supreme courts of the territories except in those cases in which the judgment of the circuit court of appeals is made final. In such cases the appeal is to the circuit court of appeals.[2]

The Supreme Court may review the final judgments of any territory[3] where the value of the matter in dispute, exclusive of costs, exceeds five thousand dollars. This provision does not apply to cases in which is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; in all such cases an appeal or writ of error may be brought without regard to the amount in dispute.[4] And such appeal or writ of error may be taken within the time and in the manner provided by law, although such territory may have been admitted as a state after the judgment or decree was rendered; and the Supreme Court is required to direct the mandate in such cases to such court as the nature of the case requires.[5]

[1] Act of March 3, 1891. See *ante* chapter xi.

[2] Shute *v.* Keyser, 149 U. S. 649.

[3] The territory of Washington was excepted from this act. Where the supreme court of the State of Washington denied a petition for a rehearing, which had been presented to the supreme court of the territory and transferred to the state court under the act admitting the state to the Union, it was held that the Supreme Court had no jurisdiction to review the judgment: North. Pac. R. Co. *v.* Holmes, 155 U. S. 137.

[4] Rev. Stat. § 702; Act of March 3, 1885, ch. 355, 23 Stat. L. 443, 1 Supp. R. S. 485. Under this act no appeal lies in a *habeas corpus* case, as it involves personal liberty and not money: *In re* Borrego (New Mex.), 46 Pac. Rep. 211.

By act of March 1, 1889, ch. 333, § 6, 1 Supp. R. S. 672, 25 Stat. L. 783, the Supreme Court may review and reverse or affirm the final judgment or decree of the U. S. court for Indian Territory where the value of the matter of dispute, exclusive of costs, exceeds $1,000.

[5] Rev. Stat. § 703. The provisions of these sections were extended to the territory of Utah, by an act of June 23, 1874, 18 Stat. L. 254. See also Rev. Stat. § 704.

"When any territory is admitted as a state, and a district court is established therein, the said district court shall take cognizance of all cases which were pending and undetermined in the superior court of such territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the Supreme Court, and shall proceed to hear and determine the same."[1]

In such cases the judgments or decrees of the district court may be reviewed in the Supreme Court on writs of error or appeal, in the same manner and with the same effect as if such judgments or decrees had been rendered in the superior court of such territory; and mandates and writs necessary to the exercise of appellate jurisdiction in such cases must be directed to such district judge, who is required to obey the same.[2]

The appellate jurisdiction of the Supreme Court over the judgments and decrees of the territorial courts in cases of trial by jury is exercised by writ of error and in all other cases by appeal, according to the rules and regulations prescribed. But, on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, must be made and certified by the court below, and transmitted to the Supreme Court with the transcript of the proceedings and judgment or decree.[3]

On appeals from territorial courts the Supreme Court will not

[1] Rev. Stat. § 569. See also §§ 567, 568.

[2] Rev. Stat. § 704. For construction of this section, see Forsyth *v.* United States, 9 How. 571; McNulty *v.* Batty, 10 *id.* 72.

[3] Act of April 7, 1874, ch. 80, § 2, 18 Stat. L. 27, 1 Supp. R. S 7. On an appeal from a territorial court the Supreme Court will decide whether the judgment or decree is supported by the facts as found by the court, and upon the admission or rejection of evidence, where exceptions have been taken; it cannot consider the weight of the evidence, nor its sufficiency to support the findings of the court: Idaho & O. Land Co. *v.* Bradbury, 132 U. S. 509; San Pedro, etc., Co. *v.* U. S., 146 *id.* 120; Smith *v.* Gale, 144 *id.* 509; Haws *v.* Victoria Copper Min. Co., 160 *id.* 303; Gildersleeve *v.* New Mex. Min. Co., 161 *id.* 573. The same applies where a jury is waived or the suit is in the nature of an equity suit and the court below finds the facts: Mammoth Min. Co. *v.* Salt Lake Machine Co., 151 *id.* 447; Grayson *v.* Lynch, 163 *id.* 468.

pass upon a question of practice unless it is apparent that injustice has been done.[1]

As before stated, appeals from territorial courts to the Supreme Court are allowed in those cases in which the judgment of the circuit court of appeals is not final.

Appeals from District of Columbia.

§ 310. The final judgments and decrees of the court of appeals of the District of Columbia may be reviewed in the Supreme Court, under the same regulations as were formerly provided in cases of writs of error and appeals from the supreme court of the District,[2] where the value of the matter in controversy, exclusive of costs, exceeds the sum of five thousand dollars: and also in cases, without regard to the value in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised by the United States.[3]

By the act of January 21, 1896,[4] an appeal lies to the Supreme Court of the United States to determine questions of constitutionality in the highways system of the District of Columbia.

The act of March 3, 1897, provides that in any case heretofore made final in the court of appeals of the District of Columbia it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.[5]

[1] Salina Stock Co. *v.* Salina Creek Co., 163 U. S. 109.

[2] *I. e.*, the same as are provided in writs of error and appeals from circuit courts.

[3] Act of Feb. 9, 1893, ch. 74, § 8, 28 Stat. L. 160. This act does not confer jurisdiction on the Supreme Court to review judgments of the court of appeals in criminal cases: Chapman *v.* U. S., 164 U. S. 436; Perrine *v.* Slack, *Ibid.* 452. The Supreme Court has no jurisdiction to review judgments of the Supreme Court of the District in criminal cases: *In re* Heath, 144 U. S. 92; Cross *v.* U. S., 145 *id.* 571; nor its judgments on *habeas corpus:* Cross *v.* Burke, 146 *id.* 82; *In re* Schneider, 148 *id.* 157. An order admitting a will to probate should be brought before the Supreme Court by writ of error: Campbell *v.* Porter, 162 U. S 478.

[4] Act of Jan. 21, 1896, ch. 5, 29 Stat. L. 3, 2 Supp. R. S. 445.

[5] Act of March 3, 1897, ch. 390, 29 Stat. L. 692, 2 Supp. R. S. 609.

Appeals from the Court of Claims.

§ 311. The United States may also take an appeal from any judgment of the Court of Claims adverse to the United States, and the plaintiff may also appeal in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of the said court as provided by section 1086.[1] Appeals must be taken within ninety days after the rendition of the judgment, and the procedure is regulated by the rules for the Court of Claims promulgated by the Supreme Court.[2]

Where Congress has authorized the Court of Claims to take jurisdiction in equity, its finding of facts may be reviewed by the Supreme Court.[3] But its finding of facts in an action at law is like the verdict of a jury, and where the testimony is not disclosed the Supreme Court will not modify the finding.[4] The Supreme Court will not review the finding where there is nothing in the record which authorizes it to go behind the finding.[5] Where the head of a department, with the consent of the claimant, transmits a case to the Court of Claims, and the court reports the case back to the department under the provisions of the act of March 3, 1887, the claimant cannot appeal from the findings of fact and of law and the decision of the court thereon.[6]

Appeals from Court of Private Land Claims.

§ 312. An appeal lay to the Supreme Court from the decisions of the Court of Private Land Claims if taken within six months from the date of the decision, subject to the same conditions, except in respect to the amount in controversy, as appeals from decisions of the circuit courts. Upon such appeals the Supreme Court might retry the case, as well issues of fact as of law, and cause new testimony to be taken, and amend the record.[7] This court has been abolished, the act of March 2, 1895,[8] providing

[1] Rev. Stat. § 707; *Ibid.* § 1086.

[2] Rev. Stat. § 708. See *post* for the Court of Claims Rules.

[3] U. S. *v.* Old Settlers, 148 U. S. 427.

[4] Stone *v.* U. S., 164 U. S. 380.

[5] Talbert *v.* U. S., 155 U. S. 45.

[6] *In re* Sanborn, 148 U. S. 222.

[7] Act of March 3, 1891, ch. 539, § 9, 26 Stat L. 854, 1 Supp. R. S. 920. These provisions were not mandatory, but simply gave the court power to take further proof and amend if they thought proper to do so: U. S. *v.* Coe, 155 U. S. 76.

[8] Act of March 2, 1895, ch. 177, par. 22, 28 Stat. L. 744, 2 Supp. R. S. 417.

that the powers and functions of the court shall cease and determine on the thirty-first day of December, 1897.

Appeals from Interstate Commerce Commission.

§ 313. By the act of March 2, 1889,[1] an appeal from the circuit courts to the Supreme Court was allowed, in complaints for violation of the interstate commerce act where the subject in dispute was of the value of two thousand dollars. This has been repealed by the court of appeals act of March 3, 1891, and no appeal now lies to the Supreme Court.[2]

Appeals from Highest Court of a State.

§ 314. The section of the Revised Statutes providing for a review and re-examination of the judgments and decrees of state courts is as follows: "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.[3] The writ shall have the same effect

[1] Act of March 2, 1889, ch. 382, § 5, 25 Stat. L. 855, 1 Supp. R. S. 689.

[2] Interstate Com. Commrs. *v.* Atchison T. & S. F. R. Co., 149 U. S. 264.

[3] The plaintiff claimed the right under the U. S. statutes to navigate on the Hudson river with masthead light and side lights in accordance with the statutory rules on the subject. The Supreme Court said: "It is of vital importance that these rules should be interpreted and enforced by the state courts in the same sense that they are in the courts of the United States. This action was for a maritime *tort* committed upon navigable waters and within the admiralty jurisdiction, and the appellate jurisdiction of this court over questions national and international in their nature cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common

as if the judgment or decree complained of had been rendered or passed in a court of the United States, and the proceedings upon the reversal shall be the same, except that the Supreme Court may at their discretion proceed to a final decision of the case, and award execution or remand the same to the court from which it was so removed. The Supreme Court may reverse, modify or affirm the judgment or decree of such state court, and may at their discretion award execution, or remand the same to the court from which it was removed by the writ."[1]

The statute makes no limitation in respect to the character or subject-matter of the suit. If there could have been any question concerning the appellate jurisdiction of this court in criminal cases under the provisions of the Judiciary Act, it would appear to be settled by the provision of section 710 of the Revised Statutes,[2] which provides as follows: "Cases on writs of error to reverse the judgment of a state court in any criminal case shall have precedence, on the docket of the Supreme Court, of all cases to which the government of the United States is not a

law remedy in a state court:" Belden *v.* Chase, 150 U. S. 691.

Where an action is brought against officers of the United States to recover land claimed by the United States, a judgment rendered against the officers for both title and possession, is a decision against the validity of an authority claimed under the United States, and the Supreme Court has jurisdiction: "So far as the judgment of a state court against the validity of an authority set up by a defendant under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the constitution, laws, or treaties of the United States, or upon principles of general jurisprudence:" Stanley *v.* Schwalby, 162 U. S. 255.

[1] Rev. Stat. § 709. See Rev. Stat. § 1017, Act of Feb. 18, 1875. The court of appeals act (March 3, 1891, ch. 517, § 5, 2 Supp. R. S. 903) provides that "nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a state, nor the construction of the statute providing for review of such cases."

The judgment of a state court, remanding a case to the trial court for further proceedings, is not a final judgment which can be reviewed by the Supreme Court: Rice *v.* Sanger, 144 U. S. 197; Meagher *v.* Minn. Thresher Mfg. Co., 145 *id.* 608; Hume *v.* Bowie, 148 *id.* 245; Werner *v.* Charleston, 151 *id.* 360. For construction of words "final judgment or decree," see *post*, § 331.

[2] This provision was embraced in an act of Congress of July 13, 1866, ch. 184, § 69, 14 Stat. L. 172.

party, excepting only such cases as the court, in its discretion, may decide to be of public importance."[1]

Writs of Error to State Courts; Not of Right.

§ 315. Writs of error to the state courts are issued in the same manner and under the same regulations, and have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States;[2] but they are not allowed as of right. The practice is to submit the record of the state court to a justice of the Supreme Court, who upon examination of it determines whether any question was made or decided in the state court which is cognizable by this court, and whether there is a case made by the record to justify the allowance of the writ.[3]

If the decision appears to involve a question that gives the court jurisdiction, it is generally allowed; but if no such question appears to have been made or decided in the court below, or where, although a claim of right under the Constitution or laws of the United States was made, yet it is clear that the jurisdiction of the court does not extend to the case presented, the writ will not be allowed.[4]

But any act, from whatever source originating, to which the state gives the sanction and the force of a law is within the meaning of the statute providing that a judgment or decree of a state court may be re-examined by this court, "where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity." If a state recognizes a statute as legal, though in fact it may not be so, this becomes an act and a statute of the state within the meaning of the provision

[1] Twitchell *v.* The Commonwealth, 7 Wall. 321; Cohens *v.* Virginia, 6 Wh. 264; Worcester *v.* Georgia, 6 Pet. 515.

[2] Rev. Stat. § 1003.

[3] Applications for a writ of error to a state court are not entertained, unless at the request of a member of the Supreme Court concurred in by his associates: *In re* Robertson, 156 U. S. 183.

[4] Twitchell *v.* The Commonwealth. 7 Wall. 321; Gleason *v.* Florida, 9 *id.* 779; Bartemeyer *v.* Iowa, 14 *id.* 26; Barron *v.* The City of Baltimore, 7 Pet. 243; Fox *v.* Ohio, 5 How. 434; Smith *v.* Maryland, 18 *id.* 76; Withers *v.* Buckley, 20 *id.* 90.

under consideration; and if the question is presented to a state court, whether such "statute or authority exercised under any state" is void on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of the validity of the statute or authority, a writ of error lies to revise the decision of the state court.[1]

A Proper Question Must be Presented by the Record.

§ 316. In order to confer jurisdiction upon this court to review, on a writ of error, the final decision of the highest state court, it must appear in the record certified to this court that a federal question was presented to the court below; that is, it should clearly appear, either that there was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and that the decision was against its validity;[2] or the validity of a statute of, or an authority exercised under, any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity;[3] or that some title, right, privilege or immunity was claimed under the Constitution, or some treaty, statute of or commission held or authority exercised under the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed by the plaintiff in error. If the record fails to show this, the writ will be dismissed for want of jurisdiction.[4] If the question presented is one of prescription, or

[1] Williams *v.* Bruffy, 96 U. S. 176. See also Ford *v.* Surget, 97 *id.* 594; The Binghamton Bridge, 3 Wall. 51; University *v.* People, 99 U. S. 309.

[2] Stanley *v.* Schwalby, 147 U. S. 508.

[3] McPherson *v.* Blacker, 146 U. S. 1.

[4] Caperton *v.* Bowyer, 14 Wall. 216; Steines *v.* Franklin Co., *Ibid.* 15; Hamilton Co. *v.* Massachusetts, 6 *id.* 636; Schuyler Nat. Bank *v.* Bollong, 150 U. S. 85; C. B. & Q. R. Co. *v.* Chicago, 166 *id.* 226. Where a right under naturalization laws is denied, the Supreme Court has jurisdiction: Boyd *v.* Thayer, 143 *id.* 135. In Sayward *v.* Denny, 158 *id.* 180, Mr. Chief Justice Fuller said that the following propositions must be regarded as settled:

1. That the certificate of the presiding judge of the state court as to the existence of grounds upon which the interposition of the Supreme Court might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon the court to re-examine the judgment below: Powell *v.* Brunswick County, 150 U. S. 433.

2. That the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way: Duncan *v.* Missouri, 152 U. S. 737; Miller *v.* Texas, 153 *id.*

of discretion in refusing to grant a motion for a new trial, or a rehearing in an equity suit, or whether a statute is repugnant to the constitution of the state, there is involved no federal question, and a writ of error to review a final judgment of the highest state court thereon will be dismissed.[1]

535; Morrison *v.* Watson, 154 *id.* 111; Winona & St. Peter Land Co. *v.* Minn., 159 *id.* 540.

3. That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment: Bushnell *v.* Crooke Mining Co., 148 U. S. 682; Loeber *v.* Schroeder, 149 *id.* 580; Miller *v.* Texas, 153 *id.* 535; Pim *v.* St. Louis, 165 U. S. 273; Miller *v.* Cornwall R. Co., 18 Sup. Ct. Repr. 34.

4. That the petition for the writ of error forms no part of the record upon which action is taken in the Supreme Court: Butler *v.* Gage, 138 U. S. 52.

5. Nor do the arguments of counsel, though the opinions of the state courts are now made such by rule: Gibson *v.* Chouteau, 75 U. S. 314; Parmalee *v.* Lawrence, 78 *id.* 36; Gross *v.* U. S. Mortg. Co., 108 *id.* 477; U. S. *v.* Taylor, 147 *id.* 695.

6. The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed: Maxwell *v.* Newbold, 59 U. S. 515; Hoyt *v.* Thompson, 66 *id.* 518.

7. Or at all events, it must appear from the record, by clear and necessary intendment, that the federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such federal question by its decision: Powell *v.* Brunswick County, 150 U. S. 433.

If the decision of a federal question was necessarily involved, it is not necessary that it should appear affirmatively in the record that such question was decided: Kankanna Co. *v.* Green Bay & M. C. Co., 142 U. S. 254; Roby *v.* Colehowe, 146 *id.* 153. When the federal question has been decided erroneously the Supreme Court will look beyond; but not otherwise: McLaughlin *v.* Fowler, 154 *id.* 663. The right denied must be one of the plaintiff's in error and not of a third person only: Ludeling *v.* Chaffe, 143 *id.* 301.

[1] Marqueze *v.* Bloom, 16 Wall. 351; Gibson *v.* Chauteau, 8 *id.* 314; Worthy *v.* The Commissioners, 9 *id.* 613; Northern Railroad *v.* The People, 12 *id.* 384; Rector *v.* Ashley, 6 *id.* 174; Furman *v.* Nichol, 8 *id.* 56; Peck *v.* Sanderson, 18 How. 42; Bank *v.* McVeigh, 98 U. S. 332; Lange *v.* Benedict, 99 *id.* 68. No federal question is raised where a state court denies an application to amend a petition to remove a case to a federal court: Steven's Admr. *v.* Nichols, 157 *id.* 370. The Supreme Court cannot review the judgment of the highest court of a state upon a question of fact: Dower *v.* Richards, 151 *id.* 658; Israel *v.* Arthur, 152 *id.* 355; Lloyd *v.* Matthews, 155 *id.* 222; *In re* Buchanan, 158 *id.* 31.

A Specific Question Must be Presented by the Record.

§ 317. The record must present a specific question or specific questions for review; and it is not sufficient that it state in a general way that "the charge of the court, the verdict of the jury and the judgment below are each against and in conflict with the Constitution and laws of the United States," but the specific clause in the Constitution, or the particular statute or act of Congress, should be indicated, that the court may determine not only what the claim is, but whether it was denied.[1]

Nor will this court entertain jurisdiction where it appears from the record that the judgment or decree of the court below may be well sustained upon other grounds than the one involved in the federal question presented, although there was error in the decision as to the latter.[2] But where the judgment or decree cannot be maintained on other grounds, and a federal question has been presented and the highest state court has decided against the right claimed by the plaintiff in error, this court will entertain jurisdiction of the case and re-examine the judgment below, and determine whether it was a proper one, and either reverse or affirm it.[3]

An annual license tax was imposed upon insurance companies located and having an office and doing business within a city, by an ordinance of the city. The question raised in the highest state court was whether such an ordinance was not repugnant to

[1] Maxwell *v.* Newbold, 18 How. 511; Wolf *v.* Stix, 96 U. S. 541; Mathews *v.* McStea, 6 Wall. 646; Messenger *v.* Mason, 10 *id.* 507; Edwards *v.* Elliott, 21 *id.* 532; Scott *v.* Jones, 5 How. 343; Clarke *v.* McDade, 165 U. S. 168.

[2] Kennebec Railroad *v.* Portland Railroad, 14 Wall. 23. See also Klinger *v.* Missouri, 13 *id.* 257; Railroad Company *v.* Maryland, 20 *id.* 643; Cockroft *v.* Vose, 14 *id.* 5; Bank of West Tennessee *v.* Citizens' Bank, 14 *id.* 9; Palmer *v.* Marston, *Ibid.* 10; Sevier *v.* Haskell, *Ibid.* 12; Smith *v.* Adsit, 16 *id.* 185; Moore *v.* Mississippi, 21 *id.* 636; Henderson Bridge Co. *v.* Henderson City, 141 U. S. 679; New Orleans *v.* New Orleans Water Works Co., 142 *id.* 79; Hammond *v.* Johnston, *Ibid.* 73; Delaware City, etc., Nav. Co. *v.* Reybold, *Ibid.* 636; Eustis *v.* Bolles, 150 *id.* 361; Rutland R. Co. *v.* Central Vermont R. Co., 159 *id.* 630; Seneca Nation *v.* Christy, 162 *id.* 283; Dibble *v.* Billingham Bay Land Co., 163 *id.* 63; Bacon *v.* Texas, *Ibid.* 207.

[3] Murdock *v.* The City of Memphis, 20 Wall. 591; Armstrong *v.* Treasurer, 16 Pet. 281; Crowell *v.* Randall, 10 *id.* 368; Cousin *v.* Blane, 19 How. 202; Grand Gulf R. Co. *v.* Marshall, 12 *id.* 165; Williams *v.* Norris, 12 Wh. 117; Brown *v.* Atwell, 92 U. S. 327; Rev. Stat. § 709.

the Constitution of the United States, and the state court decided that it was not. This court held that a writ of error would lie from the decision.[1]

So an objection to the introduction of a deed as evidence for the want of a revenue stamp, required by the statutes of the United States, but which was admitted in evidence notwithstanding the objection,[2] was held to present a question as to the proper interpretation of a United States statute;[3] and so the power of the court in bankruptcy under such statutes to order a sale of property in a particular case was also held to present a proper federal question and to give the Supreme Court jurisdiction on a writ of error.[4]

Right of the United States to a Writ of Error.

§ 318. Where the United States is a party to a suit in a state court, it has the same right to a review by a writ of error, and no more than a private individual, and they are entitled to it under the same circumstances.[5]

Highest Court of a State; Construction.

§ 319. The statute provides for the removal of a cause by a writ of error in the cases specified, from the final judgment or decree of "the highest court of a state in which a decision in the suit could be had."[6] It does not follow, therefore, that the deci-

[1] Home Insurance Co. *v.* City Council, 93 U. S. 116. See also Osborne *v.* Mobile, 16 Wall. 479; Cannon *v.* New Orleans, 20 *id.* 577; Sevier *v.* Haskell, 14 *id.* 15; McGuire *v.* The Commonwealth, 3 *id.* 382; The License Cases, 5 *id.* 462; Weston *v.* City Council, 2 Pet. 449.

[2] Hall *v.* Jordan, 15 Wall. 393.

[3] Gregory *v.* McVeigh, 23 Wall. 294.

[4] O'Brien *v.* Weld, 92 U. S. 81. The question whether a receiver appointed by a federal court is responsible for the acts of his predecessor is not a federal question: McNulta *v.* Lochridge, 141 U. S. 327. The Supreme Court has jurisdiction where state court declines to give full faith and credit to a judgment of another state: Huntington *v.* Attrill, 146 *id.* 657. But the mere construction of such a judgment does not deny full faith and credit so as to give jurisdiction: Glenn *v.* Garth, 147 *id.* 360. Where the supreme court of a state fails to give proper effect to a decree of a U. S. circuit court the Supreme Court has jurisdiction to correct the error: Dowell *v.* Applegate, 152 *id.* 327.

[5] United States *v.* Thompson, 93 U. S. 586. See also Dolman *v.* Insurance Co., 14 Wall. 666; Insurance Co. *v.* Hendren, 92 U. S. 287; Rockhold *v.* Rockhold, *Ibid* 130.

[6] Where the highest state court decides a federal question against appellant, and remands it for further proceedings, and the lower court ren-

sion sought to be reviewed should have been rendered by the highest court or court of last resort in the state; but it is only necessary that it be the court of last resort, or the highest court where a decision could be had in the particular case in which a review of the decision is desired. If there is a trial in a state court of original jurisdiction, and a federal question is presented, if there is no right of appeal therefrom to the highest court of review in the state for want of the sufficiency of the amount in controversy, or for any other cause, then the writ may issue to such state court of original jurisdiction, and the Supreme Court can take cognizance of the cause.[1] And this has been held to be proper where a party has a clear right to appeal from an inferior to a higher state court, but this right is unlawfully refused; in which case it has been held proper to send the writ to the former, and to hear and determine the cause when the record is properly certified from such court.[2]

There are other cases where the writ will issue to an inferior state court; and the letter of the law will not be permitted to destroy its spirit and purpose. Thus, where a cause involving a federal question has been duly passed upon and determined against the party insisting upon rights under federal laws, in the highest court of the state, and has been remanded to an inferior court of the state, requiring it to proceed in accordance with the opinion, and enter judgment there, the inferior court would in such a case be treated as the highest court of the state, and the writ of error would properly issue to it.[3]

In case the highest court of the state reverses the judgment or decree of the inferior court, and remands the cause for further proceedings, a writ issuing to the former for the purpose of reviewing a federal question would be dismissed;[4] mere reversal by the highest state court of the judgment or decree of an inferior court is not such a final judgment of the highest state court

ders final judgment against him, he must appeal again to highest state court although it declines to reconsider the questions decided on first appeal: Great Western Telegr. Co. *v.* Burnham, 162 U. S. 339.

[1] Miller *v.* Joseph, 17 Wall. 655.

[2] Gregory *v.* McVeigh, 23 Wall. 294; Downham *v.* Alexandria, 9 *id.* 659; Richmond, etc., R. Co. *v.* Railroad Company, 13 How. 80; Windsor *v.* McVeigh, 93 U. S. 274; Bryan *v.* Bates, 94 Mass. 201; Bacon *v.* Texas, 163 U. S. 207.

[3] Atherton *v.* Fowler, 91 U. S. 143.

[4] Davis *v.* Couch, 94 U. S. 514.

as is contemplated by the statute giving jurisdiction to the Supreme Court on writs of error to the state courts.[1]

What the Certified Record Must Contain.

§ 320. The record should clearly show that a proper federal question was presented, and in case a right, title, privilege or immunity was set up and claimed, it must appear that this was claimed by the plaintiff in error for himself and not for another, and that the decision was against him.[2]

It must further appear from the certified record that the state court decided the very case relied upon to give the Supreme Court jurisdiction;[3] and if it appears from the record that it was not necessary for the state court to pass upon the question, or that such a question was not in fact passed upon,[4] or that the decision rested upon the general principles of the law of nations, or upon a constitutional provision which merely declares a settled rule of jurisprudence,[5] this court will not take cognizance of the cause, but will dismiss the writ for the want of jurisdiction.[6]

Jurisdiction Cannot be Conferred by Consent.

§ 321. It is a doctrine universally recognized that jurisdiction, either original or appellate, of federal courts cannot be conferred by consent. The jurisdiction of these courts is conferred by the Constitution and by acts of Congress, and is special and limited; and they have no jurisdiction except in the particular cases provided for them. Neither the consent of both parties nor of their counsel can give jurisdiction either of an original case or an appeal or writ of error, but the record must show the requisite facts conferring it.[7]

[1] McComb *v.* Commissioners, 91 U. S. 1; Tracy *v.* Holcomb, 24 How. 427; Parcels *v.* Johnson, 20 Wall. 654.

[2] Warfield *v.* Chaffe, 91 U. S. 690; Long *v* Converse, *Ibid.* 105; Verden *v.* Coleman, 1 Black 472; Henderson *v.* Tennessee, 10 How. 311; Hale *v.* Gaines, 22 *id.* 149.

[3] Cockroft *v.* Vose, 14 Wall. 5.

[4] Long *v.* Converse, 91 U. S. 105; Texas *v.* White, 6 Wall. 733; Huntingdon *v.* Texas, 16 *id.* 412; Horn *v.* Lockhart, 17 *id.* 580.

[5] Tennessee Bank *v.* Bank of Louisiana, 14 Wall. 9; Palmer *v.* Marston, *Ibid.* 10.

[6] New York Life Ins. Co. *v.* Hendren, 92 U. S. 286; Bethel *v.* Damaret, 10 Wall. 537.

[7] Mills *v.* Brown, 16 Pet. 525; Walker *v.* Taylor, 15 How. 64; Medberry *v.* State, 24 *id.* 413; Murdock *v.* Memphis, 20 Wall. 590; Smith *v.* Adsit, 16 *id.* 185.

Constitutionality of State Laws.

§ 322. If the question presented was whether a statute of a state was void on the ground of its repugnance to the Constitution of the United States, it must appear from the record that the decision was in favor of its validity, or the Supreme Court could not take cognizance of the case.[1] But if it is claimed that the legislature of a state had no authority to make the statute, or did not pass the statute involved in the controversy, this would not present a federal question which could be reviewed on a writ of error.[2]

Illustration of the Application of the Statute.

§ 323. The construction and application of the provision of the federal statute under consideration may be illustrated by a few cases. Thus, where the plaintiff in error sued upon certain notes, claiming that under a proper construction of the Constitution of the United States he was entitled to the payment thereof in gold and silver coin, and the decision of the court below was against his claim, this was held to be a proper case for review on a writ of error.[3]

So where the question presented was whether the mortgage of a vessel, duly recorded in pursuance of an act of Congress, gave a better lien than an attachment under the statute of a state, and the decision was that it did not, this was held reviewable on a writ of error.[4]

[1] Walker *v.* Taylor, 5 How. 64; Commonwealth Bank *v.* Griffith, 14 Pet. 56; Rector *v.* Ashley, 6 Wall. 142; Gordon *v.* Caldcleugh, 3 Cr. 268; Doe *v.* Eslava, 9 How. 421; Montgomery *v.* Hernandez, 12 Wh. 129.

[2] Scott *v.* Jones, 5 How. 343; Coons *v.* Gallagher, 15 Pet. 18; Williams *v.* Norris, 12 Wh. 117; Owings *v.* Speed, 5 *id.* 420; McKinney *v.* Carroll, 12 Pet. 70; Crowell *v.* Gallagher, 10 *id.* 368. The validity of a statute is not drawn in question every time that rights under it are controverted: Ferry *v.* King County, 141 U. S. 668. Where it is claimed that a statute impairs the obligation of a contract and the validity of the statute is admitted, and it is only a question of its construction, the Supreme Court has no jurisdiction: Centr. Land Co. *v.* Laidley, 159 *id.* 103.

[3] Trebilcock *v.* Wilson, 12 Wall. 687. See also Dooley *v.* Smith, 13 *id.* 604; Legal Tender Cases, 12 *id.* 457; University *v.* People, 99 U. S. 309.

[4] Aldrich *v.* Ætna Co., 8 Wall. 491. See also White's Bank *v.* Smith, 7 *id.* 640.

Claim Under a Statute, Grant or Treaty of the United States.

§ 324. If a title, right or privilege is claimed under a statute, grant or treaty of the United States, the decision must be against the title, right or privilege specially set up or claimed by the party seeking a review of the judgment of the state court.

Thus, where a defendant in a suit in ejectment claimed the land in controversy under a title which sprung from a reservation in a treaty between the United States and an Indian tribe, and the state court decided against the validity of the title thus set up, it was held by the Supreme Court that the title thus asserted grew out of a treaty, and that the case presented a proper federal question which gave the court jurisdiction.[1] So where the claim of title to land rested upon an act of Congress, it was held that it must appear that the decision was against the claim thus asserted, to give the Supreme Court jurisdiction on a writ of error.[2] And where the question presented to the state court was as to the validity of a patent of lands granted by the United States, and the decision of the state court was against its validity, this was held to be reviewable on a writ of error.[3]

Review on Error in Criminal Cases.

§ 325. The statute covers decisions in criminal cases as well as in civil suits, and there is no distinction between them in respect to the right of re-examination in this court.[4]

[1] Henderson *v.* Tennessee, 10 How. 311; Owings *v.* Norwood, 5 Cr. 344; Udell *v.* Davidson, 7 How. 769; Fulton *v.* McAffee, 16 Pet. 149; Montgomery *v.* Hernandez, 12 Wh. 129.

[2] Rector *v.* Ashley, 6 Wall. 142; Bagnel *v.* Brodrick, 13 Pet. 436; Lessieur *v.* Price, 12 How. 60.

[3] Reichart *v.* Felps, 6 Wall 160. See also Taylor *v.* Maguire, 17 *id.* 253; Neilson *v.* Lagow, 12 How. 110; Carpenter *v.* Williams, 9 Wall. 786. Spies *v.* Illinois, 123 U. S. 131: Brooks *v.* Missouri, 124 *id.* 394; Clark *v.* Pennsylvania, 128 *id.* 395; Quimby *v.* Boyd, *Ibid.* 488.

[4] Prigg *v.* Commonwealth, 16 Pet. 539; Worcester *v.* Georgia, 6 *id.* 515; Cohens *v.* Virginia, 6 Wh. 264; Twitchell *v.* Commonwealth, 7 Wall. 32. No appeal lies unless the accused was deprived of some constitutional right or unless the trial was held under a statute which is unconstitutional: Gibson *v.* Miss., 162 U.S. 565.

Where a person has been arrested and taken by violence from one state to another, where he is held under process legally issued, the Supreme Court will not interfere: Cook *v.* Hart, 146 U. S. 183, affirming Ker *v.* Ill. 119 *id.* 463, and Mahon *v.* Justice, 127 *id.* 700.

The statute gives precedence in such cases on the docket of the Supreme Court. It provides as follows: "Cases on writs of error to revise the judgment of a state court in any criminal case shall have precedence on the docket of the Supreme Court of all cases to which the government of the United States is not a party, excepting only such cases as the court in its discretion may decide to be of public importance."[1]

Jurisdiction Depending upon Amount in Controversy.

§ 326. In some of the statutes, as has been seen, the right to a writ of error or an appeal is limited to cases where the matter in dispute exceeds a certain amount. Under the Revised Statutes[2] the matter in dispute, exclusive of costs, must have exceeded the sum or value of $5000. Although this provision has been repealed, by the court of appeals act, nevertheless the cases decided under it are applicable, at the present time, to the provision of the later statutes in which a jurisdictional amount is limited.[3] These cases will now be referred to, it being borne in mind that they were decided under the provision limiting the amount to $5000.

It is manifest that the judgment itself frequently determines the question as to the right so far as the value in controvery is concerned, as, for example, where it is against a defendant and it does not exceed the jurisdictional amount, exclusive of costs. In such a case if he were to prosecute a writ of error the Supreme Court would have no jurisdiction, although the claim of the plaintiff might exceed that sum.[4] Thus where the plaintiff claimed for the infringement of a patent more than the amount required to entitle him to a writ of error, but obtained a judgment for only $400, it was held on a writ of error by the defendant that the amount in controversy as to him was only $400, and that the court had no jurisdiction of the writ.[5]

[1] Rev. Stat. § 710.

[2] § 691 as amended by the act of Feb. 16, 1875.

[3] Appeals from the circuit court of appeals to the Supreme Court are limited to cases where the amount in controversy, exclusive of costs, exceeds $1,000. See *ante*, § 280.

[4] Smith *v.* Honey, 3 Pet. 469.

[5] Gordon *v.* Ogden, 3 Pet. 33 (1830); s. c., Lawyers' Ed. Bk. 7, p. 592, note. See also Rodd *v.* Heartt, 17 Wall. 354; Clifton *v.* Sheldon, 23 How. 481; Wise *v.* Turnpike Co., 7 Cr. 276.

If the judgment below is against the defendant, the amount of the judgment on general principles would fix the amount in controversy as to him, in the absence of a counter claim; but if the judgment be less than the jurisdictional amount for either party, and the plaintiff sues out the writ of error, this court has jurisdiction if the damages claimed in the declaration, less the amount of the judgment, exceed that sum.[1] The matter in controversy is the amount at the time the judgment is rendered, and when the right to a review attaches; hence the interest accruing thereafter cannot be added to the judgment in computing the amount in controversy.[2] The amount in dispute is usually found in the pleadings, but the court will not be confined to them in determining this question of the sufficiency of the matter in controversy, and it is sufficient to defeat the right to review if it otherwise appears in the record.[3]

In an action upon a money demand where the general issue is pleaded, the value in dispute is the debt claimed and its amount stated in the body of the declaration, and not merely the damages claimed in the prayer for judgment at its conclusion; and if the debt does not exceed the jurisdictional amount the plaintiff is not entitled to a review on a writ of error, although the amount of damages claimed exceeds that sum.[4] But if an action is

[1] Walker *v.* United States, 4 Wall. 163; Gordon *v.* Ogden, 3 Pet. 33.

[2] Bank of U. S. *v.* Daniel, 12 Pet. 32; Smith *v.* Honey, 3 *id.* 469; Walker *v.* United States, 4 Wall. 163; Western Union Tel. Co., 93 U. S. 565. In Benson Min. Co. *v.* Alta Min. Co., 145 U. S. 428, the district court of a territory awarded a judgment for $4,590.06 with interest from its date. The Supreme Court of the territory affirmed the judgment. The interest from the date of the judgment to its affirmance made the amount over $5,000; and it was held that the Supreme Court had jurisdiction. Where the circuit court improperly added interest to a verdict, thereby increasing the amount to over $5,000, it was held that as the judgment actually rendered was for an amount which gave the court jurisdiction the writ would not be dismissed on the ground that it should have been for less: B. & O. R. Co. *v.* Griffith, 159 U. S. 603. The demand for the amount must appear to have been made in good faith: Gorman *v.* Havird, 141 *id.* 206. Where the amount is raised for the purpose of giving the court jurisdiction the writ will be dismissed: North. Pac. R. Co. *v.* Booth, 152 *id.* 671.

[3] Gray *v.* Blanchard, 97 U. S. 564.

[4] Lee *v.* Watson, 1 Wall. 337; Schacker *v.* Hartford Fire Ins. Co., 93 U. S. 241. The amount must be determined by the sum directly involved in the particular case, and

brought to recover less than the jurisdictional amount required on a writ of error, and the defendant pleads a set-off or counter claim in excess of that amount in a state where he is entitled to a judgment for the excess of such a set-off or counter claim, if the judgment is against him he may sue out a writ of error.[1] The amount of the matter in controversy must exceed the jurisdictional amount, or there would be no jurisdiction on a writ of error; hence if it is precisely that amount, no writ of error lies.[2] If the verdict is for more than that amount, and the party in whose favor it is rendered will enter a remittitur for the excess before the entry of a judgment on the verdict, this will defeat any right to the writ, as the amount of the matter in controversy at the time of the judgment entry would be less than the amount required.[3] If a judgment is for more than the jurisdictional amount, yet if the cause was tried on an agreed statement of facts in which the defendant admitted that he owed sufficient of the amount claimed to reduce the matter in dispute to less than that sum, no writ of error will lie.[4]

The same general principles prevail where the value of the amount in controversy is an element of jurisdiction in all the various federal courts, whether at law or in equity, and whether on a writ of error or appeal.[5]

not by contingent loss which may be incurred by either of the parties by reason of the judgment: New England Mtge. Co. *v.* Gay, 145 U. S. 123. Where the judgment of the lower court was for less than $5,000 it was held that the Supreme Court had not jurisdiction although the decision involved the validity of a lease and indirectly a sum greater than the jurisdictional amount: Clay Center *v.* Farmers' Loan & Tr. Co., 145 *id.* 224. So in a bill to restrain the collection of a tax, unaccrued taxes cannot be added: Washington & G. R. Co. *v.* Dist. of Columbia, 146 *id.* 227; Trask *v.* Wanamaker, 147 *id.* 149; Hollander *v.* Fechheimer, 162 *id.* 326; Citizens' Bank *v.* Cannon, 164 *id.* 319.

[1] Ryan *v.* Bindley, 1 Wall. 66. Where a defendant put in a counter claim for $10,000, and the plaintiff recovered less than $5,000, it was held that the defendant might take the case to the Supreme Court: Buckstaff *v.* Russell, 151 U. S. 626. See also Clark *v.* Sidway, 142 *id.* 682.

[2] Walker *v.* United States, 4 Wall. 163; Western Union Tel. Co. *v.* Rogers, 93 U. S. 565.

[3] Thompson *v.* Butler, 95 U. S. 694.

[4] Tinstman *v.* First Nat. Bk., 100 U. S. 6.

[5] See *ante*, ch. VIII; also Yzanga Del Valie *v.* Harrison, 93 U. S. 233; Cook *v.* United States, 2 Wall. 518. The judgment against the defendant is *prima facie* the amount in controversy, and this continues until the

Where the Matter in Controversy is not Susceptible of Valuation.

§ 327. The matter in controversy must be such as is capable of a pecuniary estimate of its value, otherwise there can be no appellate jurisdiction of the suit. Thus, for example, where the matter in dispute is the right to freedom;[1] or the right to the custody of a minor child;[2] or whether the defendant below is liable to imprisonment on execution process;[3] or as to the right of guardianship of the persons and property of children, but not on account of any pecuniary value attached to the office,[4]—there is in such cases no right of revision on writ of error or appeal, as there is no matter in dispute susceptible of a pecuniary valuation.

But it has been held that a "mining claim" in Nevada may be the subject of a controversy, and of value in money, even though the land on which the claim exists has never been surveyed and brought into market; and if it appears that it is of the requisite value, the Supreme Court will take cognizance of the case upon writ of error or appeal.[5]

It is not sufficient, as we have noticed, that the value of the matter in dispute is precisely the jurisdictional amount, but it must exceed that sum to give this court jurisdiction; and where the judgment is for that amount in favor of the plaintiff, and the defendant prosecutes in error, the amount in controversy is fixed by the judgment, and this court has no jurisdiction.[6]

Value a Jurisdictional Fact; Consent cannot confer Jurisdiction.

§ 328. It is evident that the value of the matter in dispute is an essential jurisdictional fact, and this court will not take cognizance of a writ of error or appeal unless it be made in some manner to appear that it is of the value fixed by the statute.

contrary is shown: Troy *v.* Evans, 97 U. S. 1. If the value of the amount in controversy is precisely $5,000, no writ of error lies: Western Union Tel. Co. *v.* Rogers, 93 U. S. 565.

[1] Lee *v.* Lee, 8 Pett. 44.

[2] Barry *v.* Mercein, 5 How. 103.

[3] Pratt *v.* Fitzhugh, 1 Blatch. 271.

[4] De Kraft *v.* Barney, 2 Black 704; Ritchie *v.* Manro, 2 Pet. 243. A writ of error will not lie to a refusal to set aside a judgment on motion: Connor *v.* Peugh, 18 How. 394.

[5] Sparrow *v.* Strong, 3 Wall. 97.

[6] Walker *v.* United States, 4 Wall. 163; Knapp v. Banks, 2 How. 73; Smith *v.* Honey, 3 Pet. 469; Gordon *v.* Ogden, *Ibid.* 33.

And it is a general doctrine of the federal courts that consent cannot confer jurisdiction in respect to the value of the amount in controversy.[1]

The statute carefully restricts the appellate jurisdiction of this court, and where this is wanting, or is not made to appear from the record, it will not examine into the questions presented in a case by the consent of parties or on the request of counsel.[2]

Where the Value of the Matter in Controversy does not Appear on the Record.

§ 329. In some cases it is not essential that the value of the matter in controversy be stated in the declaration or other pleading; as, for instance, in cases of replevin, and of proceedings for a writ of mandamus, and in suits in ejectment and for dower.

On a writ of error or appeal in such cases, the practice is to allow affidavits in the Supreme Court to show the value of the matter in the controversy.[3] But this will not be allowed on appeal after the cause has been dismissed for want of jurisdiction apparent upon the record.[4] The same practice prevails in admiralty cases; and where it does not appear from the record in those cases what the value of the interest of the appellant is, he will

[1] Kelsey *v.* Forsyth, 21 How. 85; Guild *v.* Frontin, 18 *id.* 135; Suydam *v.* Williamson, 20 *id.* 428; Sampson *v.* Welsh, 24 *id.* 207. But see Arthurs *v.* Hart, 17 *id.* 6; Shankland *v.* Washington, 5 Pet 390; Railroad Co. *v.* Ramsey, 22 Wall. 322. A stipulation between the parties, with other facts in the record, may be considered as sufficient proof of the amount in dispute. A bill was brought to dissolve an association of railroads for the regulation of freight rates. The parties stipulated "that the daily freight charges on interstate shipments collected by all the railway companies at points where they compete with each other were at the time of the agreement mentioned in the pleadings herein and have been since, more than $1,000." The court held that the facts appearing in the record and the stipulation showed that more than $1,000 was involved in the maintenance of the agreement of association, and that the court had jurisdiction: U. S. *v.* Trans-Missouri Freight Assn., 166 U. S. 290, 310.

[2] Mills *v.* Brown, 16 Pet. 525; The Lucy, 8 Wall. 307; The Nonesuch, 9 *id.* 504; Pennsylvania *v.* Quicksilver Co., 10 *id.* 558; Railway Company *v.* Ramsey, 22 *id.* 322; Walker *v.* Taylor, 5 How. 64.

[3] Rush *v.* Parker, 5 Cr. 287; *Ex parte* Bradstreet, 7 Pet. 634; Course *v.* Steadman, 4 Dall. 22. See also Peyton *v.* Robertson, 9 Wh. 527; Cooke *v.* Woodrow, 4 Cr. 13; Carr *v.* Fife, 156 U. S. 494; U. S. *v.* Trans-Missouri Freight Assn., 166 *id.* 290.

[4] Richmond *v.* Milwaukee, 21 How. 391.

be permitted in this court to make proof that his interest exceeds the jurisdictional sum, and allowed time therefor.[1]

When the Value stated in the Pleadings is Conclusive.

§ 330. Where the declaration or bill states the value of the property or interest in controversy, this is held to be conclusive of that fact, and affidavits will not, generally, be received to show the property or interest of more value.[2] Where there was a claim on a fund in the registry of the admiralty of several mortgagees secured by one mortgage, and the fund exceeded the jurisdictional amount, it was held that an appeal would lie to this court by the mortgagees in a body, though the claim of no one of them exceeded that sum.[3] But where a decree was made by the circuit court sitting in admiralty that two persons should pay a certain amount of freight in different sums, neither of which amounted to the sum that gave the right of appeal, though the sums decreed to be paid by both exceeded that amount, the court, on appeal by one of the parties, held that it must be dismissed for want of jurisdiction, as the rights of the two were distinct and independent, and that if the freight was a joint matter, both should have joined in the appeal.[4] So where, in proceedings under libels in admiralty, for seamen's wages, the circuit court adjudged that there was due the libellants over $32,000 from the respondents, and a separate decree was entered for the amount due each libellant respectively, but none of the sums thus decreed amounted to the jurisdictional sum required for an appeal, and from these separate decrees the respondents in the circuit court prayed an appeal to this court, and gave a separate appeal bond upon the appeal from each, as well as a joint appeal from the whole, the appeal was dismissed, upon the ground that the sum in controversy in each case was less than the amount required to confer jurisdiction on this court.[5]

[1] The Grace Girdler, 6 Wall. 441; Richmond *v.* Milwaukee, 21 How. 391.

[2] Richmond *v.* Milwaukee, 21 How. 391; Brown *v.* Shannon, 20 *id.* 55; Bank of Alexandria *v.* Hooff, 7 Pet. 168.

[3] Rodd *v.* Heartt, 17 Wall. 354.

[4] Clifton *v.* Sheldon, 23 How. 481.

[5] Oliver *v.* Alexander, 6 Pet. 143. Where the validity of a title exceeding $5,000 in value is involved, and several persons claim under the same title, the court has jurisdiction, although each claim is less than the jurdisdictional amount; but where the claims are separate and distinct and merely joined for convenience the court has no jurisdiction over claims under $5,000: New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, and see Chapman *v.* Handley, 151 *id.* 443.

The same doctrine applies in proceedings by a libel for salvage, and in proceedings *in rem* generally.

When separate claims are interposed for salvage, although the libel is joint against the whole property, each claim is treated as a separate and distinct proceeding. In form it is joint, but in its nature and effect it is a several suit of each claimant, upon which there may be a separate and independent hearing and decree. It follows, therefore, in such cases, that to entitle the claimants to an appeal there must be the jurisdictional amount required as to each of the claimants.[1]

Final Judgments and Decrees.

§ 331. In order that a writ of error or an appeal may be taken to the circuit court of appeals or to the Supreme Court, the judgment or decree of the lower court must be final. A judgment or decree is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to execute the judgment or decree.[2] A decree by consent is a final one from which an appeal may be taken.[3]

[1] Stratton *v.* Jarvis, 8 Pet. 4.

[2] Talley *v.* Curtain, 8 U. S. App. 424; Dufour *v.* Lang, 2 *id.* 477; Tex. & Pac. R. Co. *v.* Gentry, 163 U. S. 353; Butterfield *v.* Usher, 91 *id.* 246; Sage *v.* Railroad Co. 96 *id.* 712; Fuller *v.* Claflin, 92 *id.* 14. A decree granting an injunction and ordering an account before a master was held not to be final: Keystone Manganese and Iron Co. *v.* Martin, 132 U. S. 91; in this case the decisions are reviewed at length by Mr. Justice Blatchford. See also Lewisburg Bank *v.* Sheffey, 140 *id.* 445; Hohorst *v.* Hamburg-Amer. Packet Co., 148 *id.* 262. Where the decree of the circuit court does not secure to a party the relief to which the decision of the Supreme Court entitles him, the decree is not final; the circuit court cannot by a partial compliance lose the power to obey the mandate of the Supreme Court to its full extent: Moran *v.* Schooling, 29 U. S. App. 71.

See as to decisions determining a collateral matter, Brush Electric Co. *v.* Cal. Elec. Lt. Co., 7 U. S. App. 208.

[3] Pacific Railroad *v.* Ketchum, 101 U. S. 289. Where a libel was ordered to stand dismissed if not amended within ten days, and an appeal was taken, it was held that the taking of the appeal was an election to waive the right to amend, that the decree of dismissal took effect immediately and was a final decree from which an appeal might be taken: The Three Friends, 166 U. S. 1. For examples of final decisions see Cent. Tr. Co. *v.* Hiawassie Co. 2 U. S. App. 1; New Orleans *v.* Peake, *Ibid.* 403; Duff *v.* Carrier, 3 *id.* 552; Rust *v.* United Waterworks Co. (8th Circ.), 70 Fed. Rep. 129; Stanley *v.* Roberts, 19 U. S. App. 407; Gunn *v.* Black, *Ibid.* 489; Cent. Tr. Co. *v.* Madden, 25 *id.* 430; Salmon *v.* Mills, 27 *id.* 732.

Where a decree in admiralty was made that a sum of money was due, without ascertaining the amount of money or decreeing its payment, it was held that this was not a final decree, and the appeal therefrom was dismissed on that account.[1] But a decree setting aside certain deeds as fraudulent and void; that certain lands and personal property should be delivered to complainant; and that an account of profits should be taken; and further providing that the bill be retained for certain matters referred to a master for a report, and that as to other matters it be dismissed without prejudice, was held to be a final decree within the meaning of the statute.[2] And a decree deciding the right to property in controversy and directing it to be delivered by the defendant to the complainant, and providing for its immediate execution, but leaving some accounts to be adjusted in pursuance of the decree, was held to be a final decree within the statute.[3]

If the decree does not settle the rights of the parties to the controversy, nor substantially determine the rights of the parties under the pleadings, it is not a final one from which an appeal can be taken. Thus, no appeal can be taken from a decree for costs alone;[4] or from an order refusing to permit a person to intervene;[5] or from a decree denying a motion to consolidate two cases, or refusing to make a person a party defendant,[6] or from a decree of the circuit court, affirming a decree of the district court, enjoining proceedings under a treasury warrant of distress;[7] or from an order of the circuit court refusing to release a party on a writ of *habeas corpus*;[8] or from an order disbarring an attorney;[9] or from an entry of a decree merely in pursuance of a mandate;[10] or from a decree directing a defend-

[1] Montgomery *v.* Anderson, 21 How. 386.

[2] Forgay *v.* Conrad, 6 How. 201. See also Michoud *v.* Girod, 4 *id.* 503; Whiting *v.* Bank of U. S., 13 Pet. 15.

[3] Thompson *v.* Dean, 7 Wall. 342.

[4] Elastic Fabric Co. *v.* Smith, 100 U. S. 110; City Bank of Fort Worth v. Hunter, 152 *id.* 512; Du Bois *v.* Kirk, 158 *id.* 58; but where the appeal is taken on other grounds the court may consider whether costs were properly awarded: Citizens' Bank *v.* Cannon, 164 *id.* 319.

[5] *Ex parte* Cutting, 94 U. S. 14.

[6] *In re* Streett, 8 U. S. App. 645.

[7] United States, *v.* Nourse, 6 Pet. 470.

[8] *In re* Philip Henrich, 5 Blatch. 414.

[9] *Ex parte* Robinson, 19 Wall. 513.

[10] United States *v.* Fremont, 18 How. 30; Corning *v.* Troy Iron, etc., Factory, 15 *id.* 451; United States *v.*

ant to execute a conveyance of certain property, and referring the case to a master to take an account of the rents and profits;[1] or from a decree declaring an assignment for the benefit of creditors void, and referring the cause to a master to take an account of the property;[2] or from a decree for the sale of property to enforce a lien, which does not ascertain the property nor the amount of the debt;[3] or from a decree dissolving an injunction without dismissing the bill;[4] or from an order refusing to set aside a decree;[5] or from a decision upon an application to set aside a decree and permit a party to except to a master's report;[6] or from an order refusing to grant a rehearing;[7] or from a decree either maintaining or dismissing a cross-bill;[8] or from a decree upon a cross-bill made before the final decree upon the original bill;[9] or from an order appointing a receiver;[10] or from an order appointing commissioners to assess damages for land taken by a bridge company;[11] nor from an order of a circuit court remanding a cause to a state court,[12] or refusing to remand;[13] but if a motion to remand be made and refused, the action of the circuit court may be reviewed after final judgment.[14] A decree in contempt proceedings ordering the petitioner to be imprisoned is not reviewable;[15] nor is a refusal to quash a writ or indictment on motion;[16] nor are discretionary motions, such

Fossalt, 21 *id.* 445. Where an appellate court remands a case to the lower court for further proceedings in conformity with its opinion, the decree is not final: Union Mut. Life Ins. Co. *v.* Kirchoff, 160 U. S. 374. See also Rice *v.* Sanger, 144 *id.* 197; Meagher *v.* Minn. Thresher Mfg. Co., 145 *id.* 608.

[1] Beebe *v.* Russell, 19 How. 283.

[2] Pullian *v.* Christian, 6 How. 209.

[3] Railroad Co. *v.* Swasey, 23 Wall. 405.

[4] Hiriat *v.* Ballou, 9 Pet. 156; Thomas *v.* Wooldridge, 23 Wall. 283.

[5] Brockett *v.* Brockett, 2 How. 238; Wylie *v.* Coxe, 14 *id.* 1; McMickin *v.* Perin, 18 *id.* 507.

[6] Terry *v.* Commercial Bank, 92 U. S. 454.

[7] Cambuston *v.* United States, 95 U. S. 285.

[8] Ayres *v.* Carver, 17 How. 591.

[9] *Ex parte* Railroad Co., 95 U. S. 221.

[10] Fla. Construction Co. *v.* Young, 11 U. S. App. 683.

[11] Luxton *v.* North Riv. Bridge Co., 147 U. S 337.

[12] *In re* Coe, 5 U. S. App 6; Jay *v.* Adelbert College, 146 U. S. 355.

[13] Bender *v.* Pennsylvania Co., 148 U. S. 502.

[14] Mo. Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556.

[15] King *v.* Wooten, 2 U. S. App. 651; *In re* Debs, 158 U. S. 564.

[16] Loeber *v.* Schroeder, 149 U. S. 580; Durland *v.* U. S., 161 *id.* 306.

as motions for new trials, continuances and the like reviewable ;[1] nor an order of the circuit court to quash an execution ;[2] or a decision of the court upon a rule or motion ;[3] or a judgment upon a demurrer to some parts of a replication, and a motion to strike out other parts, still leaving in the replication some essential allegations ;[4] where a bill is dismissed as to one defendant who had demurred, but is undisposed of as to other defendants who had answered, the decree is not final.[5]

An appeal does not lie from a decision upon a motion made to dissolve an injunction.[6] Nor does it lie from the decision of the circuit court, in the exercise of its revisory powers, over the decisions of registers in bankruptcy relating to the adjustment of priorities of creditors and conflicting interests in a bankrupt's estates, taken on appeal to the circuit court, under the provisions of the late Bankrupt Act.[7]

When there was a decree in chancery in the circuit court, in which there was a reference to a master to ascertain the amount

[1] N. Y. & Tex. Steamship Co. *v.* Anderson, 1 U. S. App. 176; Morning Journal Assn. *v.* Rutherford, *Ibid.* 296; Southwest Va. Imp. Co. *v.* Frari, 8 *id.* 444; Nor. Pac. R. Co. *v.* Conger, 12 *id.* 240; Walton *v.* Chic. H. P. M. & O. R. Co., 12 *id.* 511; Davis *v.* Patrick, 12 *id.* 629; Marco *v.* Hicklin, 15 *id.* 55; Dietz *v.* Lymer, 19 *id.* 663; Mack *v.* Porter, 25 *id.* 525; Cent. Vt. R. Co. *v.* Bateman, 26 *id.* 584; Edward P. Allis Co. *v.* Columbia Mill Co., 27 *id.* 583; Cox *v.* Hart. 145 U. S. 376; Mex. Centr. R. Co. *v.* Pinkney, 149 *id.* 194; Wheeler *v.* U. S., 159 *id.* 523; Bucklin *v.* U. S., *Ibid.* 682; Goldsby *v.* U. S., 160 *id.* 70; Addington *v.* U. S., 165 *id.* 184.

[2] McCargo *v.* Chapman, 20 How. 555; Boyle *v.* Zacherie, 6 Pet. 648; Early *v.* Rogers, 16 How. 599.

[3] Toland *v.* Sprague, 12 Pet. 300; Brooks *v.* Hunt, 17 John. 484; Doswell *v.* De La Lanza, 20 How. 29; Henderson *v.* Moore, 5 Cr. 12; Barr *v.* Gratz, 4 Wh. 220; Marine Ins. Co. *v.* Hodgson, 6 Cr. 206.

[4] Holcombe *v.* McKusick, 20 How. 552. If a circuit court on motion dismiss a suit on the ground that it has no jurisdiction, a writ of error will not lie to revise the judgment: Insurance Co. *v.* Comstock, 16 Wall. 258; Railroad Co. *v.* Wiswall, 23 *id.* 507.

[5] Bank of Rondout *v.* Smith, 156 U. S. 330. See also Hohorst *v.* Hamburg Amer. Packet Co., 148 *id.* 262. For examples of decisions held not to be final, see Dudley E. Jones Manufg. Co. *v.* Munger Manufg. Co., 2 U. S. App. 188; Hamner *v.* Scott, 19 *id.* 639; Merriman *v.* Chic. & E. I. R. Co., 24 *id.* 428; Porter *v.* Davidson, 25 *id.* 353; Elder *v.* McCloskey, 37 U. S. App., 199; Lockwood *v.* Wickes (8th Circ.), 75 Fed. Rep. 118; Beek & Pauli Lith. Co. *v.* Wacker & Birk B. & M. Co. (7th Circ.), 76 *id.* 10.

[6] Collum *v.* Eager, 2 How. 61; Verden *v.* Coleman, 18 *id.* 86; Gibbons *v.* Ogden, 6 Wh. 448.

[7] Hall *v.* Allen, 12 Wall. 452.

of damages sustained by the plaintiff for an infringement of a patent right by the defendant, and the decree perpetually enjoined the further use of it by the defendant, but did not decree the payment of costs, they and all other questions in the cause being reserved until the coming in of the report of the referee, it was held that this was not a final decree from which an appeal would lie to this court.[1]

The decree must be filed in order to give jurisdiction on appeal. Therefore where a decree was made in admiralty that a sum of money was due, but the amount was not determined at the time of the appeal and no order made for its payment, it was held on appeal that this was not a final decree from which an appeal could be taken, and that it could not be cured by any amendment in the Supreme Court.[2] But where a decree decided the rights of litigants to the property in controversy, and entitled the complainant to have it carried into execution, but left certain accounts to be adjusted between the parties in pursuance of the decree, this was held to be appealable.[3] So a decree entered at chambers for the foreclosure of a mortgage and a sale of the mortgaged property pursuant to a power contained in a mortgage importing a confession of judgment on non-payment, and under a proceeding in Louisiana called "executory process," was held to be a final decree and appealable.[4] So when a decree was made setting aside certain deeds as fraudulent and void, and that certain lands and slaves be delivered up to the complainant, and that the master should take and report an account of the rents and profits of the lands and slaves and of certain money and notes, retaining the bill for this latter purpose, this was held to be a final decree from which an appeal could be taken, as the determination of

[1] Bernard *v.* Gibson, 7 How. 650. Suits at law can only be brought to the Supreme Court by a writ of error, and not by appeal: Sarchet *v.* United States, 12 Pet. 143; Parish *v.* Ellis, 16 *id.* 451; United States *v.* Goodwin, 7 Cr. 108.

[2] Montgomery *v.* Anderson, 21 How. 336.

[3] Thompson *v.* Dean, 7 Wall. 342. But a decree awarding a permanent injunction to restrain infringements of a patent, and for an account and a reference to a master to take and state the same and report thereon, was held not to be appealable: Humiston *v.* Stanthorp, 2 Wall. 106; Bernard *v.* Gibson, 7 How. 650.

[4] Marin *v.* Lalley, 17 Wall. 14. See also Bronson *v.* Railroad Company, 2 Black 524; Whiting *v.* Bank of U. S., 13 Pet. 15.

the question of title to the lands and slaves was a final one within the meaning of the statute.[1]

But appeals cannot be taken from merely interlocutory orders;[2] or from the decision of a court as to the terms on which an amendment will be allowed on sustaining a demurrer to a bill;[3] or from the decision of a court adjusting priorities and conflicting interests in a bankrupt's estate;[4] or from a decree reversing a decree in the court below for the foreclosure of a mortgage and remanding the cause back for a new trial.[5] But an appeal will lie from a decree of the circuit court confirming a sale made by its previous order, which disposes of the whole matter of the suit.[6]

[1] Forgay *v.* Conrad, 6 How. 201.

[2] Forgay *v.* Conrad, 6 How. 201. See also *Ex parte* Cutting, 94 U. S. 14.

[3] Sheets *v.* Seldon, 7 Wall. 416.

[4] Hall *v.* Allen, 12 Wall. 452; Morgan *v.* Thornhill, 11 *id.* 65; Mead *v.* Thompson, 15 *id.* 635.

[5] Moore *v.* Robbins, 18 Wall. 588; Tracy *v.* Holcomb, 24 How. 426; Brown *v.* Union Bank, 4 *id.* 465.

[6] Sage *v.* Railroad Company, 96 U. S. 712; Blossom *v.* Railroad Company, 1 Wall. 655; Butterfield *v.* Usher, 91 U. S. 246.

CHAPTER XV.

APPELLATE PROCEDURE.

All the Parties Must Join in a Writ of Error or Appeal.

§ 332. Having considered the jurisdiction of the Supreme Court on writs of error and appeals, we come now to the subject of appellate procedure. With regard to the circuit court of appeals it is provided by rule of court that the practice in that court shall be the same as in the Supreme Court as far as that shall be applicable, and that the process shall be in like form and tested in the same manner as process of the Supreme Court.[1] Hence we shall consider the two courts together in discussing this question of procedure.

It is essential that all the parties against whom a joint judgment has been rendered should join in the application for a writ of error or in the appeal, unless sufficient cause be shown for the non-joinder.[2] If one of two parties refuses to join in a writ of error, the other party may issue a writ of summons, by which the party refusing to join may be brought before the court; and if he still refuses, an order or judgment of severance may be made by the court, in which case the party desiring to prosecute a writ of error or appeal can do so alone. The effect of the judgment of severance is that the party refusing to proceed is

[1] Circ. Ct. of App. Rules 8 and 9. See Mercantile Trust Co. *v.* Wood, 19 U. S. App. 567.

[2] Williams *v.* Bank, 11 Wh. 414; Masterson *v.* Herndon, 10 Wall. 416; Hampton *v.* Rouse, 13 *id.* 187; Simpson *v.* Greeley, 20 *id.* 152; O'Dowd *v.* Russell, 14 *id.* 402; Hedges *v.* Seibert. etc., Co., 3 U. S. App. 25. A writ of error should state the Christian name of the plaintiff in error and not the initial letter thereof only: Walton *v.* Marietta Chair Co., 157 U. S. 342. The act of March 3, 1875, ch. 137, § 9, 18 Stat. L. 470, 1 Supp. R. S. 85, regulates proceedings where one of the parties to a final judgment or decree in the circuit court has died before the time for a writ of error or appeal has expired. And see Gen. Rule 15, Circ. Ct. of App. Rule 19.

barred from prosecuting the same right in another action, and the defendant in the writ of error cannot be harassed by a subsequent suit or proceeding for the same cause of action, by the party thus refusing to unite in the application for the writ, it being joint in its nature.[1]

But there are cases where, although there are several parties defendant, one of them may bring a writ of error without joining the others. For example, where a suit was brought by the plaintiffs against a defendant to recover a balance due for work and materials furnished in building a house, and to enforce a lien therefor against the house and the lot on which it was situated; and several other parties who "had or claimed to have some interest claim or lien on the encumbered premises," as stated in the petition or bill, were made defendants; but it was also claimed by the plaintiff in his said petition or bill that "their interest, claim or lien, if any, had accrued subsequently to that of plaintiffs;" and it prayed for a personal judgment only, against the party for whom the work and materials were furnished, and that the other defendants be barred and foreclosed of all right, claim, lien, etc., in, on and to the premises, and that the premises be decreed to be sold, etc., and a judgment was rendered against the defendant first above mentioned in *personam*, for the debt, and a decree entered that the premises should be sold, etc., and to this judg-

[1] Simpson *v.* Greeley, 20 Wall. 152; Mussina *v.* Cavazos, 6 *id.* 355; Masterson *v.* Herndon, 10 Wall. 416; Williams *v.* Bank of the U. S., 11 Wh. 414; Todd *v.* Daniel, 16 Pet. 521; Wilson *v.* Insurance Co., 12 *id.* 140; Brooke's Abr. 238, *tit.* "Summons and Severance;" 2 Rolle's Abr., *tit.* same, 488; Arch. Civ. Plead. 54; Tidd's Prac. 129, 1136, 1169; Deneal *v.* Archer, 8 Pet. 526; Smyth *v.* Strader, 12 How. 327; Hardee *v.* Wilson, 146 U. S. 179; Inglehart *v.* Stansbury, 151 *id.* 68; Davis *v.* Mercantile Trust Co., 152 *id.* 590; Sipperley *v.* Smith, 155 *id.* 86; The Columbia, 29 U. S. App. 647. No one but an appellant can be heard in an appellate court for the reversal of a decree rendered in the lower court: Mail Co. *v.* Flanders, 12 Wall. 130. And see The Stephen Morgan, 94 U. S. 599; Groves *v.* Sentell, 153 *id.* 465; U. S. *v.* Blackfeather, 155 *id.* 180; Cherokee Nation *v.* Blackfeather, *Ibid.* 218; U. S. *v.* Perry, 4 U. S. App. 386; Calder *v.* Henderson, 2 *id.* 627. As, under the act of March 3, 1875, ch. 137, it was in the power of the court to re-arrange the parties and place them on different sides according to the actual facts, it is to be assumed that that power was exercised by the court below, and its action in that respect is not reviewable in the Supreme Court: Evers *v.* Watson, 156 U. S. 527.

ment the latter sued out a writ of error, it was held by the Supreme Court that the judgment was of such a separate character as authorized him to ask to have it reviewed in the latter court, without joining with him his co-defendants in the court below.[1] And, in general, where a decree is several as to different defendants and the interest represented by each is separate and distinct from that of the others, any party may appeal separately to protect his own interests.[2]

Proper Parties on the Record.

§ 333. A judgment will not be re-examined upon a writ of error unless there are proper parties to it. An inanimate object, like a vessel, has not the legal capacity to prosecute legal proceedings in the federal courts; and hence it cannot prosecute a writ of error or appeal. But in proceedings *in rem*, if a person claims the thing or its proceeds, he becomes a party to the proceedings, and has all the rights in respect to a writ of error or an appeal that any other party has.[3] One who was not a party to the original proceeding cannot appeal unless he shows that he has been admitted as a party by the express order of the court, or has been treated as a party to the record.[4]

Bill of Exceptions.

§ 334. The exceptions to the rulings of the court below must be taken at the time and stated in the bill of exceptions or they will not be considered in the appellate court.[5] They should also be specifically and fully set out.[6] A defence not considered nor

[1] Germain *v.* Mason, 12 Wall. 259.

[2] Gilfillan *v* McKee, 159 U. S. 303.

[3] Steamboat Burns, 9 Wall. 237.

[4] *Ex parte* Cutting, 94 U. S. 14; Sage *v.* Central R. Co., 93 *id.* 412; *Ex parte* Jordan, 94 *id.* 248.

[5] Allis *v.* U. S., 155 U. S. 117; Boston & Albany R. Co. *v.* O'Reilly, 158 *id.* 334; Claasen *v.* U. S., 142 *id.* 140; Topliff *v.* Topliff, 145 *id.* 156; Tex. & Pac. R. Co. *v.* Volk, 151 *id.* 73; Hickory *v.* U. S., *Ibid.* 303; Wasatch Min. Co. *v.* Crescent Min. Co., 148 *id.* 293; Tucker *v.* U. S., 151 *id.* 164; St. Clair *v.* U. S., 154 *id.* 134; Herrick *v.* Tripp G. L. Co., 5 U. S. App. 507; U. S. *v.* Goodrich, 12 *id.* 108; Bracken *v.* Un. Pac. R. Co. *Ibid.* 421; Masonic Benevolent Assn. *v.* Lyman, 18 *id.* 507; Terre Haute & I. R. Co. *v.* Mansberger, 24 *id.* 551. See as to waiver of exceptions: Campbell *v.* Haverhill, 155 U. S. 610.

[6] Ward *v.* Cochran, 150 U. S. 597; Bogk *v.* Gassert, 149 *id.* 17; Hickory *v.* U. S., 160 *id.* 408; Shaner *v.* Alterton, 151 *id.* 607; Buckstaff *v.* Russell, *Ibid.* 626; Newport News & Miss. Val. Co. *v.* Pace, 158 *id.* 36; Thiede *v.* Utah Ty., 159 *id.* 510; Un. Pac. R. Co. *v.* Callaghan, 161 *id.* 91; South Carolina *v.* Wesley, 155 *id.*

determined in the lower court may not be urged in the Supreme Court or circuit court of appeals.[1] A bill of exceptions may be signed after the expiration of the term at which judgment was rendered, if the parties agree or the court orders an extension of the time for its presentation.[2] It cannot be used to bring up the whole testimony in a case.[3]

Time for Review Limited.

§ 335. The time within which a writ of error may be prosecuted or an appeal taken in a civil action at law or in equity is limited to two years after the entry of the judgment, decree or order, except where the party entitled to prosecute a writ of error or to take an appeal is an infant, or insane, or imprisoned, in which case the writ may be prosecuted or the appeal taken within two years after the judgment, decree or order is entered, exclusive of the term of such disability.[4] The writ of error must be brought or the appeal taken within two years, except in the cases above stated; and a writ of error is not brought, within the meaning of the statute, until it is filed in the court where the judgment, decree or order was entered. It is not sufficient that the writ is tested or issued within the time limited, but all the steps necessary for the perfecting of the right to a writ or an appeal, on the part of the party desiring a review of the decision, must be taken.[5] The language of the section of the Revised Statutes just cited is that "no judgment, decree or order of a circuit or district court in any civil action at law or in equity shall be reviewed in the Supreme Court on writ of error or appeal, unless the writ of error is brought or the appeal taken within two years

542; Red River Cattle Co. *v.* Sully, 144 *id.* 209. And see Cir. Ct. of App. Rules 10 and 12.

[1] U. S. Nat. Bk. *v.* First Nat. Bk., 27 U. S. App. 750; Newman *v.* Schwerin, 22 *id.* 393. As to the authentication of the bill of exceptions under Rev. Stat. § 953, see Cooke *v.* Avery, 147 U. S. 375.

[2] Waldron *v.* Waldron, 156 U. S. 361; U. S. *v.* Jones, 149 *id.* 262.

[3] St. Louis *v.* West. Un. Tel. Co., 166 U. S. 388; Grayson *v.* Lynch, 163 *id.* 468.

[4] Rev. Stat. § 1008. A bill of review must be filed within the time allowed by this section for an appeal, unless special reasons are shown: Rector *v.* Fitzgerald, 19 U. S. App. 423.

[5] Brooks *v.* Norris, 11 How. 204. Objection may be taken by motion: *Ibid.* A rebellion in the state where the court sits suspends the limitations during its continuance: The Protector, 9 Wall. 687.

after the entry of such judgment, decree, or order," etc. The entry of a "judgment, decree or order" here referred to has been construed to mean such a one as substantially disposes of the whole case, and not a mere preliminary, discretionary or incidental judgment, or an interlocutory order or decree, which does not thus dispose of the matter in controversy.[1]

In all cases under section 6 of the circuit courts of appeals act not made final in the circuit courts of appeals, the appeal or writ of error to the Supreme Court must be taken or sued out within one year after the entry of the order, judgment or decree sought to be reviewed.[2]

Want of Jurisdiction Apparent of Record.

§ 336. If it is apparent on the record that the appellate court has no jurisdiction of an appeal, it will dismiss it without any motion for that purpose, and even if both parties should oppose it;[3] and in such a case an appellant may of course have it dismissed on motion therefor, even though it be resisted by the appellee.[4] And where the Supreme Court has once reviewed a case, and a mandate has been issued and a judgment entered in the circuit court in accordance with such mandate, an appeal therefrom will be dismissed with costs, on motion of the appellee, as a matter of course.[5] If an appeal has been once dismissed, it cannot be redocketed without a new appeal;[6] and if an appeal is not allowed in open court at the term at which it was rendered, it will be dismissed, where no citation has been issued and the appellee does not appear.[7]

Right of the Appellant to Dismiss an Appeal.

§ 337. An appellant has the right to dismiss his appeal, and this right could be exercised at any time before the submission of the cause, unless the adverse party should also appeal; and even though resisted by the other side.[8]

[1] Forgay *v.* Conrad, 6 How. 201; Whitney *v.* Bank of U. S., 13 Pet. 15; Michoud *v.* Girod, 4 How. 503.

[2] Act of March 3, 1891, ch. 517, § 6, 26 Stat. L. 826, 1 Supp. R. S. 904.

[3] Gruner *v.* United States, 11 How. 163; Sampson *v.* Welsh, 24 *id.* 207; The Lucy, 8 Wall. 307; Merrill *v.* Petty, 16 Wall. 338; Burnham *v.* First Nat. Bk., 10 U. S. App. 485.

[4] Latham's Appeal, 9 Wall. 145.

[5] Stewart *v.* Salamon, 97 U. S. 361.

[6] Rogers *v.* Law, 21 How. 526.

[7] Vansant *v.* Gaslight Co., 99 U. S. 213.

[8] Latham's Appeal, 9 Wall. 145. It is irregular for appellant's counsel to

When Dismissed of Course.

§ 338. If an appeal is not allowed in open court at the term at which the decree was rendered, and no citation has been issued, the appeal will be dismissed, even though the appellee does not appear;[1] and the appeal from a decree of the circuit court entered in accordance with a mandate of the appellate court will of course be dismissed on motion of the appellee, as the matter, having once been determined by the court, could not be reheard and determined in this way.[2]

Appeals Cannot be Taken in the Name of a Steamboat or a Partnership.

§ 339. An appeal must be taken in the name of some person. An inanimate object, like a steamboat or other vessel, has no capacity to prosecute legal proceedings or to take an appeal, even where the proceedings are in admiralty and *in rem*.[3]

Nor can an appeal be taken in a partnership name where the record does not set forth the names of the parties to it. The doctrine is the same in this respect whether the proceeding is by writ of error or appeal, or in equity, admiralty or prize cases. In all these cases the names of the individual parties to the suit or proceeding must be stated, and where the interest is joint, as we have already seen, all those on the same side must join in the appeal. Where in admiralty the appeal was taken by and in the name of "William A. Freeborn & Co.," this court, on motion to dismiss for want of jurisdiction, sustained the motion and refused to allow the appellant to amend the petition of appeal, citation, bond or the libel.[4] So where, in a writ of

file, with a motion to dismiss, the appeal papers stating the grounds on which the motion is made: U. S. *v.* Griffith, 141 U. S. 212.

[1] Vansant *v.* Gaslight Co., 99 U. S. 213. When, pending an appeal from the judgment of a lower court and without any fault of the defendant, an event occurs which renders it impossible for the appellate court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief, the court will not proceed to a formal judgment, but will dismiss the appeal: Mills *v.* Green, 159 U. S. 651.

[2] Stewart *v.* Salamon, 97 U. S. 361. A cause dismissed under a rule of court cannot, at a subsequent term, be redocketed without a new appeal: Rogers *v.* Law, 21 How. 526.

[3] Steamboat Burns, 9 Wall. 237.

[4] The Protector, 11 Wall. 82. See also Smith *v.* Clark, 12 How. 21; Owings *v.* Kincannon, 7 Pet. 399; Porter *v.* Foley, 21 How. 393; Hodge *v.* Williams, 22 *id.* 87; Williams *v.* Bank, 11 Wh. 414.

error, the parties were described as Holliday *et al v.* Boston *et al.*, the same rule was applied.[1]

Writ of Error upon an Agreed Case.

§ 340. It is the well-established practice in this country, and especially in the federal courts, to take the judgment of the court upon a case stated, or an agreed statement of facts. In such cases it is usual for counsel representing their clients to sign the statement, which becomes a part of the record of a cause, and a writ of error will lie from a decision thereon, if it is an agreement of ultimate facts, and not the mere evidence of the facts. In this respect it is in the nature of a special verdict.

Like a special verdict, if it is ambiguous or imperfect, if it contains only the evidence of facts and not the facts themselves, or contains only a part of the facts in issue essential to be shown,[2] and is silent as to others, this court will remand the case for a new trial.[3] There would in such a case be nothing from which the court could determine whether the judgment is consistent with the facts. But where the ultimate facts relating to the points in issue are properly admitted in the court below, the judgment of the court below, based upon such stated case, may be here reviewed on a writ of error, without a bill of exceptions.[4]

The Writ and Record.

§ 341. When a writ of error is allowed it will be issued by the clerk of the court, as we shall hereafter more particularly notice,

[1] Holliday *v.* Boston, 4 How. 645. See also Deneale *v.* Stump, 8 Pet. 526; Wilson *v.* The Life and Trust Ins. Co., 12 *id.* 140; Davenport *v.* Fletcher, 16 How. 142.

[2] Norris *v.* Jackson, 9 Wall. 125; Insurance Co. *v.* Tweed, 7 *id.* 44. Where some facts are agreed to and there is oral testimony as to others and the trial court makes a ruling of law on a point not affected by the oral testimony, the appellate court may consider it, notwithstanding the fact that there was only a general finding of facts: St. Louis *v.* West. Un. Telegr. Co., 148 U. S. 92. The Supreme Court cannot take notice of a stipulation of counsel as to evidence bearing on a finding of the court below: Fort Worth City Co. *v.* Smith Bridge Co., 151 *id.* 294.

[3] Graham *v.* Bayne, 18 How. 60; Prentice *v.* Zane, 8 *id.* 481; Burr *v.* Des Moines Co., 1 Wall. 99.

[4] Stimpson *v.* Railroad, 10 How. 329; United States *v.* Eliason, 16 Pet. 291; Ingle *v.* Coolidge, 2 Wh. 363; Miller *v.* Nichols, 4 *id.* 311; Shankland *v.* Washington, 5 Pet. 390. For the practice of the Supreme Court on a certificate of division of opinion, see chapter viii. *supra*. For writs of error and appeals where cases are tried without a jury, see the same chapter.

signed by him and under the seal of the court.[1] It is the duty of the clerk to which it is directed to make return thereto, and to annex to and return with the writ, "at the day and place mentioned, an authenticated transcript of the record, and assignment of errors, and a prayer for reversal, with a citation to the adverse party;"[2] and in all cases brought to the Supreme Court by writ of error or appeal, the clerk of the court by which the judgment or decree was rendered is also required to annex to and remit with the record a copy of the opinion or opinions filed in the case; and no cause will "be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in this court, shall be filed."[3] In the circuit court of appeals the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of error shall set out the part referred to *in totidem verbis* whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.[4]

[1] Gen. Rule 8.

[2] Rev. Stat. § 997.

[3] Gen. Rule 8, par. 2 and 3.

[4] Circ. Ct. of App. Rule 11. Gen. Rule 35 makes the same provision in the Supreme Court where an appeal or writ of error is taken from a district or circuit court direct to that court under § 5 of the circuit courts of appeals act. And see Gen. Rule 36 as to the allowance of appeals or writs of error in such cases. The transcript on an appeal to a circuit court of appeals need not always contain all the proofs, entries, papers and proceedings below. See Nashua & L. R. Corp. *v.* Boston & Lowell Corp., 21 U. S. App. 50. As to the transmission of the copy, filing the record, etc., see Circ. Ct. of App. Rule

If there is a failure in these respects the circuit court may either dismiss the writ or appeal or may dispose of the case so far as it can consistently be done on the record returned.[1] But it is the duty of the plaintiff in error to see that a proper transcript is prepared, and if it does not contain all that it should contain, he may, on a proper showing, procure a *certiorari*, for diminution of record, and thereby secure a full and proper return. But the citation is not considered as a part of the record, as it is not a part of the proceedings of the court, and hence a cause will not be dismissed on this account, but proof thereof may be shown *aliunde*.[2]

Rules Relating to the Transcript and Papers.

§ 342. Rule 8 provides that whenever it shall be necessary or proper, in the opinion of the presiding judge of the circuit court or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in the Supreme Court upon appeal or writ of error, he may make such rule or order for the safe-keeping, transportation and return of such papers as to him may seem proper, and the Supreme Court will receive and consider such papers in connection with the transcript of the proceedings. And Rule 11 provides that whenever any record transmitted to the Supreme Court upon a writ of error or appeal shall contain any document, paper, testimony or other proceeding in a foreign language, and the record does not contain a translation of such document, paper, testimony or other proceeding, made under the authority of the inferior court or admitted to be correct, the record shall not be printed, but the case shall be reported to the court by the clerk, and the court will thereupon

14. And see Rule 10, as to the bill of exceptions. A circuit court of appeals will not take judicial notice of proceedings had in the circuit or district courts which form no part of the record of the case before it: U. S. *v.* Manderson's Ex'rs., 3 U. S. App. 199.

[1] It was so held also where there was a failure to file a brief, in the form required by Gen. Rule 21: Portland Co. *v.* United States, 15 Wall. 1; Deitsch *v.* Wiggins, *Ibid.* 539. As to the taking of supersedeas bonds, see Gen. Rule 29; Circ. Ct. of App. Rule 13; Davis *v.* Wakelee, 156 U. S. 680.

[2] Innerarity *v.* Byrne, 5 How. 295. And see Jacobs *v.* George, 150 U. S. 415. As to the practice where a question of law is certified by the circuit court of appeals to the Supreme Court, see Gen. Rule 37.

remand it to the inferior court in order that a translation may be there supplied and inserted in the record.[1]

In case of appeal of any cause in equity or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, must be transmitted to the Supreme Court. And either the court below or the Supreme Court may order any original document or other evidence to be sent up in addition to the copy of the record or in lieu of a part of it. On such appeals no new evidence can be received in the Supreme Court except in admiralty and prize cases.[2] The transcript is required to be under the hand of the clerk with the seal of the court; but it is sufficiently authenticated if it be signed by a deputy clerk in the name of and for his principal, and sealed with the seal of the court.[3]

With regard to cases where the district and circuit courts have concurrent jurisdiction with the court of claims, the act of March 3, 1887,[4] provides: "That when the findings of fact and the law applicable thereto have been filed in any case as provided in section six of this act, and the judgment or decree is adverse to the government, it shall be the duty of the district attorney to transmit to the Attorney-General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court and his written opinion as to the same. Whereupon the Attorney-General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same: *Provided*, That no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon at the rate of four per centum per annum until the time when an appropriation is made for the payment of the judgment or decree."

[1] Gen. Rule 8, par. 5. And see Circ. Ct. of App. Rule 14.

[2] Rev. Stat. § 698; *Ibid.* § 750.

[3] Garneau *v.* Dozier, 100 U. S. 7.

[4] Act of March 3, 1887, ch. 359, § 10, 24 Stat. L. 505, 1 Supp. R. S. 561.

Writs of Error and Appeals; when Returnable.

§ 343. In reference to the time of the return of a writ of error or appeal it is provided by rule that "all appeals, writs of error and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day." [1] It is further required by statute that the adverse party shall have at least thirty days' notice on a citation to the Supreme Court.[2]

Appearance of Counsel; and the Parties.

§ 344. Upon the filing of the transcript of the record, brought up either by writ of error or appeal, the appearance of the counsel for the plaintiff in error or appellant shall be entered.[3] If there should be no appearance entered for the plaintiff or appellant when the case is called for trial, the defendant or appellee may have the case called and dismiss the writ of error, or may open the record and ask for an affirmance of the judgment below.[4] If the defendant fails to appear when the cause is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.[5] If neither party appears when the case is reached on a regular call of the docket, and no appearance is entered for either party, the case must be dismissed at the cost of the plaintiff;[6] and if at the second term neither party is prepared to argue the cause, it will be dismissed at the cost of the plaintiff, unless sufficient excuse is shown for a postponement.[7]

Docketing Cases; Filing Transcript.

§ 345. It is the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of the

[1] See also Circ. Ct. of App. Rule 15.

[2] Rev. Stat. § 999. See also Gen. Rule 9 See as to service, Tripp *v.* Santa Rosa St. R. Co., 144 U. S. 126, and, as to signing, Freeman *v.* Clay, 2 U. S. App. 151.

[3] Gen. Rule 9, par. 3. An appeal authorized by the appellant personally, and in good faith entered in the Supreme Court in the name of the attorney and counsel below, will not be dismissed simply because that counsel had not authorized such entry, when the appellant, on learning of the mistake, appears by other counsel and prosecutes it in good faith: Davis *v.* Wakelee, 156 U. S. 680.

[4] Gen. Rule 16.

[5] Gen. Rule 17.

[6] Gen. Rule 18.

[7] Gen. Rule 19.

Supreme Court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of the court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of the court. If the plaintiff in error or appellant fails to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case is the plaintiff in error or appellant entitled to docket the case and file the record after the same has been docketed and dismissed under this rule, unless by order of the court. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of the Supreme Court; and, if the case is docketed and a copy of the record filed with the clerk by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.[1] But in cases of writs of error or appeals from California, Oregon, Washington, New Mexico. Utah, Nevada, Arizona, Montana, Idaho, Wyoming, North Dakota, South Dakota and Alaska, the time mentioned above is extended to sixty days.[2]

To sustain a motion to have the case docketed and dismissed it would be necessary to procure and produce a certificate of the clerk of the court below, stating the cause and showing that the appeal had been duly allowed.[3]

And it has been held that the certificate of the clerk of the court below, that he cannot consistently with his other duties certify the record in time to comply with the rule, is not a sufficient reason for extending the time prescribed by the rule.[4] But in a later case the court was disposed not to enforce it, where the delay in procuring the transcript arose from no fault of the

[1] Gen. Rule 9. And see Circ. Ct. of App. Rules 16 and 17.

[2] *Ibid.*

[3] West *v.* Brashear, 12 Pet. 101.

[4] Sturgess *v.* Harrold, 18 How. 40. See also Edmondson *v.* Bloomshire, 7 Wall. 306.

appellant, but resulted from the fraud of the other party, or the ill-founded order of the court, or the contumacy of the clerk below.[1] In the absence of any showing of excuse for the delay, the transcript must be filed and the case docketed in the Supreme Court within the time prescribed by Rule 5, or the court will not have jurisdiction and the cause will be dismissed; but this would not prevent another appeal at any time within two years, and the court would take cognizance of the case on such subsequent appeal, if the transcript was properly filed and the case docketed within the time prescribed after the date of the last appeal.[2]

Motion Day.

§ 346. By a rule of the Supreme Court Monday of each week is motion day, on which all motions ready for argument will be heard. All motions not required by the rules of the court to be put on the docket are entitled to a preference, and will be heard immediately after the rendering of opinions, if such motions shall be made before the court shall have entered upon the hearing of a cause upon the docket.[3]

Motions to Dismiss and Affirm.

§ 347. All motions must be in writing, and contain a brief statement of the facts on which they are based and the objects of the motion; and no motion to dismiss, except on special assignment by the court, can be heard unless previous notice thereof is given to the adverse party or the attorney or counsel of such party. And all such motions, except those to docket and dismiss, as provided for by the ninth rule, must be submitted in the first instance on printed briefs or arguments; and if the court desires further argument on the subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss is required to serve notice of the motion, with a copy of his brief or argument, on the counsel for the plaintiff in

[1] United States *v.* Gomez, 3 Wall. 752. See also United States *v.* Hodge, 3 How. 534; Villabolos *v.* United States, 6 *id.* 81.

[2] Steamer Virginia *v.* West, 19 How. 182; United States *v.* Carey, 6 *id.* 106; Mesa *v.* United States, 2 Black 721. And see Evans *v.* State Bank, 134 U. S. 330; Tuskaloosa Northern R. Co. *v.* Gude, 141 *id.* 244; Williams *v.* Passumpsic Bk. *Ibid.* 249; Wauton *v.* De Wolf, 142 *id.* 138.

[3] Gen. Rule 6.

error or the appellant of record in this court, at least three weeks before the time fixed for submittting the motion, except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice must be served at least thirty days before the time fixed for the hearing of the same.[1]

With a motion to dismiss a writ of error to a state court there may also be united a motion to affirm on the ground that, although the record may show that the court has jurisdiction, it is manifest that the writ was sued out for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.[2] But in such a case, if there is no color of right to dismiss and the case is clearly within the jurisdiction of the court, the motion to affirm merely will be denied.[3]

If the court below, having no jurisdiction, gives a judgment in a cause for either party, or improperly decrees affirmative relief to a claimant, this court will reverse it, and not merely dismiss the suit. But it is not important on error or appeal when or how the court below obtained jurisdiction. It is sufficient that it had jurisdiction at the time the judgment or decree was rendered, even though rendered by consent, and no errors of law will be considered which were waived by such consent.[4]

Mode of Service of Notice and Proof.

§ 348. Service of the notice of a motion to dismiss may be made on counsel by mail; and an affidavit of the deposit in the mail of the notice and brief or argument to the address of the counsel to be served, duly postpaid, at such time as to reach him by due course of mail three weeks or thirty days, as the case may require, before the time fixed by the notice for a hearing, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia; and on proof of such service the motion will be considered, unless for satisfactory reasons further time be given by the court to either party.[5]

[1] Gen. Rule 6. And see Circ. Ct. of App. Rule 21.

[2] *Ibid.*

[3] Whitney *v.* Cook, 99 U. S. 607. And see Sire *v.* Ellithorpe Air Brake Co., 137 *id.* 579; Kauffman *v.* Wootters, 138 *id.* 285. On such motions so much of the record must be printed as will enable the court to act understandingly without referring to the transcript: Walston *v.* Nevin, 128 *id.* 578.

[4] Pacific Railroad *v.* Ketchum, 101 U. S. 289; Removal Cases, 100 U. S. 457.

[5] Gen. Rule 6, par. 4.

Procedure in Case of Diminution of Record.

§ 349. We have referred to certiorari as the proper remedy in case of diminution of the record sent up to this court in case of writ of error or appeal.[1] But this will not be awarded unless a motion therefor is made in writing, and the facts on which it is based shall be verified by affidavit or admitted by the opposite party. It is further required that all motions for a certiorari shall be made at the first term of the entry of the cause; otherwise it cannot be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.[2] A return to a certiorari is sufficient if made by the clerk, without being signed by the judge.[3] If there appears to be an omission of an important paper from the record sent up, which may be necessary for a correct decision of the case, the court may, on its own motion, order the case continued and a certiorari to be issued to bring it up.[4]

The writ of certiorari is properly used in such cases only to bring up to the court of error documents, writings and other portions of the record which have not been sent up, and it cannot be used to compel the Court of Claims to supply certain supposed defects in its conclusions deducible from the evidence before it.[5]

Where either Party Dockets the Case; Rights of Appellee.

§ 350. Either party may docket a cause; and if docketed and a copy of the record is filed with the clerk, either by the plaintiff in error or appellant, within the time prescribed by Rule 9, or by the defendant in error or appellee at any time thereafter, the case stands for argument.[6]

[1] *Post*, § 373.

[2] Gen. Rule 14; Circ. Ct. of App. Rule 18.

[3] Stewart *v.* Ingle, 9 Wh. 526; Worcester *v.* Georgia, 6 Pet. 515.

[4] Morgan *v.* Curtenius, 19 How. 8. See also *Ex parte* Dugan, 2 Wall. 134; Clark *v.* Hackett, 1 Black 77; Stearns *v.* United States, 4 Wall. 1.

[5] United States *v.* Adams, 9 Wall. 661. The circuit court had no power to issue a writ of certiorari to a commissioner appointed by the court under the act of September 18, 1850, he being in no legal sense a magistrate inferior to the circuit court: *Ex parte* Van Orden, 3 Blatch. 166. In a case of equitable jurisdiction before the Court of Claims, the whole record must be sent up, as the Supreme Court reviews the law and facts: Harvey *v.* U. S., 105 U. S. 671; U. S. *v.* Old Settlers, 148 *id.* 427.

[6] Gen. Rule 9, par. 2.

When a State is a Party.

§ 351. In certain cases a state is entitled to priority on the docket, where it is a party to a suit. Section 949 of the Revised Statutes provides: "When a state is a party, or the execution of the revenue laws of a state is enjoined or stayed in any suit in a court of the United States, such state, or the party claiming under the revenue laws of a state the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties."

Under the provisions of this section, if the state is plaintiff merely *ex relatione*, the cause will not be advanced even on the consent of both parties, as where the suit is in the name of a state and in the nature of a *quo warranto* to try the title to an office.[1] Nor are the ordinances of a municipal corporation levying taxes, revenue laws of a state within the meaning of the statute, and a case arising under them is not entitled to priority on the docket.[2]

Nor will preference be given to cases in which the execution of the revenue laws of a state is enjoined, unless it satisfactorily appears that the operations of the government of the state will be embarrassed by the delay. The court may determine, under all the circumstances of the case, what is a "sufficient reason" for the preference given by the statute.[3] The motion for the advancement of a cause under the statute must be made by a state or by a party claiming under the laws of a state.[4]

Where a person was indicted and convicted in one of the inferior courts of the state of Maryland for trading without having a license as required by the laws of that state, and the judgment was affirmed in the court of appeals of that state, and brought to the Supreme Court on a writ of error, where a motion was made by the plaintiff in error to advance the cause, it was held that the motion was not within the foregoing statute, as the motion was not filed by the state nor by a party claiming under

[1] Miller *v.* State, 12 Wall. 159.

[2] Davenport City *v.* Dows, 15 Wall. 390.

[3] Hoge *v.* Railway Co., 93 U. S. 1.

[4] Ward *v.* State, 12 Wall. 163. See also as to advancing causes: Carter *v.* Greenhow, 109 U. S. 64; Louisiana *v.* New Orleans, 103 *id.* 521; Sage *v.* Central R. Co., 93 *id.* 412.

the laws of the state; that under the 26th rule of the court it was a motion addressed to its discretion, and inasmuch as it appeared that the plaintiff in error was not in jail, the court refused to grant the motion.[1]

And, as we have observed, the statute does not apply to the ordinances of a municipal corporation, as they cannot be classed as revenue laws of a state; and the preference given to the state, when it is a party, or when its revenues are enjoined, to any party claiming under such laws, is from the presumed importance of such cases to the internal welfare of such state and because of its dignity as a member of the Union, and these reasons for the preference do not apply to municipal more than to private corporations.[2]

Submission of Causes on Printed Arguments.

§ 352. Causes may be submitted to the court on printed arguments, where counsel on both sides choose to do so, within the first ninety days of the term; but in such cases twenty copies of the arguments, signed by attorneys and counsellors of the court, must be first filed—ten copies for the court, two for the reporter, three to be retained by the clerk, and the residue for counsel. And if a case is reached on a regular call of the docket, and a printed argument shall be filed for one or both parties, the case stands on the same footing as if there were an appearance by counsel. But if a case, under such circumstances, is argued orally on behalf of one party only, a printed argument on behalf of the other party will not be received unless it is filed before the argument begins, and if none is filed, the court will consider and decide the case upon the *ex parte* argument; and no brief or argument will be received, through the clerk or otherwise, after the case has been argued and submitted, except after notice to the opposite party, and upon leave granted in open court.[3]

Call of the Docket.

§ 353. The mode of procedure on a call of the docket is pointed out by the rules of the court. The call commences on the second day of the term, and cases will be taken up for argu-

[1] Ward *v.* Maryland, 12 Wall. 163. 390.
[2] Davenport City *v.* Dows, 15 Wall. [3] Gen. Rule 20.

ment in the order they stand on the docket, if the parties or either of them are ready when the cases are called. If neither party is ready, the case will go down to the foot of the docket; but only ten causes will be considered as liable to be called each day, including the one under argument.[1]

Criminal cases, however, may be advanced, on motion of either party, by leave of court, as well as may cases once adjudicated by the court upon the merits, and again brought up by writ of error or appeal; and revenue cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also, by leave of court, be advanced on motion of the Attorney-General; but all motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.[2] No other cause will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court; and every cause which shall have been called in its order and passed, and placed at the foot of the docket, will, if not reached again during the term, be continued to the next term. But after a cause has been passed, under circumstances which do not require it to be placed at the foot of the docket, the parties may have it heard by filing with the clerk a joint request to that effect. The clerk must then reinstate the case for call ten cases after the case under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, then either party may move to take up the cause, and it will then be assigned to such a place on the docket as the court may direct. But no stipulation to pass a cause without placing it at the foot of the docket will be recognized as binding upon the court, and a cause can otherwise be passed only upon an application made for that purpose, and by leave granted in open court.[3] Two or more cases involving the same question may, however, by leave of court, be heard together, but they must be argued as one case.[4]

[1] Gen. Rule 26.

[2] Gen. Rule 26. If a cause has been placed at the foot of the docket, the court will not take it up on motion and assign a day for its argument, when other cases of great public importance have been assigned for what may be the remainder of the term: Berry *v.* Mercein, 4 How. 574.

[3] Gen. Rule 26, pars. 7, 9, 10.

[4] Gen. Rule 26, par. 8.

Cases brought by error or appeal, under the acts of February 25, 1889, chapter 236, and March 3, 1891, chapter 517, section 5, where the only question in issue is that of the jurisdiction of the court below will be advanced on motion, and heard under the rules prescribed by rule 6, in regard to motions to dismiss writs of error and appeals.[1]

The Argument; Preparation for the Same; Procedure on.

§ 354. Only two counsel will be heard for each party on the argument of a cause, and only two hours on each side will be allowed for argument, unless by special leave of the court, granted before the argument begins. This time may be apportioned between the counsel in their discretion; but there must be a fair opening of the case by the party having the opening and closing arguments.[2] When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.[3]

At least six days before the argument, the counsel for the plaintiff in error or appellant is required to file with the clerk of the court twenty-five copies of a printed brief, one of which on application he is required to furnish to each of the counsel engaged upon the other side. This brief is required to contain, and in the order hereinafter stated—

1. A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

2. An assignment of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and specifically each error asserted and intended to be urged, and in cases brought up by appeal the assignment shall state, as specifically as may be, in what the decree is alleged to be erroneous. If error is assigned to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

3. A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support

[1] Gen. Rule 32.

[2] Gen. Rule 22.

[3] Gen. Rule 21, par. 6.

of each point. When the statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

4. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether in the instructions given or instructions refused.

5. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.

6. Counsel for a defendant in error, or appellee, shall file with the clerk twenty-five printed copies of his argument, at least three days before the case is called for a hearing. His brief shall be of a like character with that required of the plaintiff or appellant, except no assignment of error is required, and no statement of the case unless that presented by the plaintiff or appellant is controverted.

7. Without such an assignment of errors, counsel will not be heard except at the request of the court, and errors not assigned according to this rule will be disregarded, though the court, at its option, may notice a plain error not assigned.

When, according to this rule, the plaintiff in error or appellant is in default, the case may be dismissed on motion, and when a defendant in error or an appellee is in default, he will not be heard except on consent of his adversary and with request of the court.[1]

The plaintiff or appellant is entitled to the opening and closing argument, except when there are cross appeals, when they are required to be argued together, and the plaintiff in the court below is entitled to open and conclude the argument.[2]

Judgment on Review.

§ 355. The court may, on review of any judgment, decree or order of the circuit court or the district court acting as a circuit court, or in prize cases, affirm, modify or reverse it, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require. But the court is prohibited from issuing executions in such cases, and is required to send a mandate to the

[1] Gen. Rule 21.

[2] Gen. Rule 22.

court below to award execution on the judgment.[1] There is, however, a discretion in the court in respect to giving a judgment and awarding execution in case of a writ of error to a state court. In such a case it may proceed to a final decision and award the execution or remand the same to the court from which the case was removed.[2]

The practice and power of the court in such cases may be illustrated by its procedure in a certain case. In Insurance Companies *v.* Boykin,[3] the defendant in error brought a suit on a policy of insurance for a loss sustained. The policy was signed by four companies who were made defendants, each of whom had agreed to become liable for one-fourth of any loss to the extent in all of ten thousand dollars, and the plaintiffs in error had consented that the action might be brought against all of them jointly instead of severally. The verdict of the jury was "that said defendants did promise and assume as said plaintiff hath alleged, and they assess the damages of the said plaintiff at ten thousand dollars, with interest from the 20th of March, 1867," and the court rendered a joint judgment accordingly. This was one of the errors assigned in this court. It was here held that the verdict was a good one, but that the court ought to have rendered a judgment that the plaintiff recover of each of the defendants severally for the one-fourth part of the ten thousand dollars, and interest from the time mentioned in the verdict, and joint judgment against all of the defendants for costs. And the Supreme Court entered the judgment which the circuit court should have done.

It is the usual practice of the court to dismiss a cause where the court below had no jurisdiction of it. But this in some cases would work injustice, as, for instance, where the inferior court has given a judgment or decree for plaintiff, or improperly decreed affirmative relief to a claimant in a case where it had no jurisdiction. "In such a case the judgment or decree of the court below must be reversed, else the party which prevailed there would have the benefit of such judgment or decree, though rendered by a court which had no authority to hear and determine the matter."[4] In such a case the judgment or decree

[1] Rev. Stat. § 701.

[2] Rev. Stat. 709, amended February 18, 1875.

[3] 12 Wall. 433.

[4] United States *v.* Huckabee, 16 Wall. 414.

should be reversed for want of jurisdiction, and the cause remanded with directions to dismiss the case.[1]

Judgment where there are Errors Apparent in the Record.

§ 356. Where there is manifest error apparent on the face of the record a re-examination in the appellate court will be had, whether it appears by a bill of exceptions or otherwise. Whatever the error may be, the facts must appear on the record in order to enable the court to review the case; but neither a bill of exceptions nor a special verdict nor an agreed case is always necessary in order to make the error apparent to a court of review. The error may otherwise appear, and where it is thus manifest, the court will consider and revise the judgment. Thus, where a suit was brought on a policy of insurance on a vessel and cargo for a total loss, and the jury found a verdict for the whole amount insured with interest, and five thousand dollars damages besides for the detention of the money and interest, and judgment was entered therefor, on error, it was held that the plaintiff below could not recover damages beyond the legal interest; that the error did not require a *venire de novo*, as it consisted in giving judgment for the five thousand dollars damages. The Supreme Court therefore reversed and modified the judgment by disallowing the five thousand dollars, and the cause was remanded with directions to enter judgment for the residue found by the jury with interest.[2]

Judgment; Interest; Damages.

§ 357. Where the judgment of the inferior court is affirmed on a writ of error, interest on the same at the same rate that similar

[1] Cutter *v.* Rae, 7 How. 729; Mansfield, C. & L. M. R. Co. *v.* Swan, 111 U. S. 379. And see § 10 of the Circuit Courts of Appeals Act.

[2] Insurance Co. *v.* Piaggio, 16 Wall. 378; Suydam *v.* Williamson, 20 How. 427; Burnett *v.* Butterworth, 11 *id.* 669; Slocum *v.* Pomeroy, 6 Cr. 221; Garland *v.* Davis, 4 How. 131; Cohens *v.* Virginia, 6 Wh. 410; Wiborg *v.* U. S., 163 U. S. 632; Tex. & Pac. R. Co. *v.* Rogers, 13 U. S. App. 547. The Supreme Court cannot, however, take notice of an assignment of error that the damages found by the jury were excessive and given under the influence of passion and prejudice. Such an error is to be redressed by a motion for a new trial: Lincoln *v.* Power, 151 U. S. 436. After a final decree in a case, an apparent want of jurisdiction on the face of the record cannot be availed of in a collateral proceeding: Evers *v.* Watson, 156 U. S. 527.

judgments bear interest in the state where the judgment is rendered is allowed from the date of the judgment below until it is paid.[1] And "in all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of ten per cent., in addition to interest, shall be awarded upon the amount of the judgment."[2] And "the same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court."[3] In cases in admiralty, damages and interest may be allowed if specially directed by the court.[4]

Where the Verdict is Clearly Right the Court will not Reverse for Technical Inaccuracies in the Charge.

§ 358. Where there is no evidence to impeach the claim made, and it is established by competent evidence, and there is no set-off, counter-claim, release or payment pleaded or shown, the court may instruct a jury to find for the plaintiff the amount so proven, as such an instruction is in accordance with the legal effect of the evidence, and there would be no disputed facts on which the jury could pass.[5] And if it clearly appears in any case that there are no disputed facts bearing on the real matters in issue, and the verdict is manifestly right, and especially where the record shows that no other result would be obtained by a new trial, the appellate court will not reverse the case, although there may have been some technical inaccuracies in the instructions given to the jury.[6]

[1] Gen. Rule 23, par. 1. And see Circ. Ct. of App. Rule 30.

[2] *Ibid.*, par. 2.

[3] *Ibid.*, par. 3.

[4] *Ibid.*, par. 4.

[5] Bevans *v.* United States, 13 Wall. 56.

[6] Walburn *v.* Babbitt, 16 Wall. 577. And see Boston & Albany R. Co. *v.* O'Reilly, 158 U. S. 334. In a criminal case, a general judgment upon an indictment containing several counts and a verdict of guilty on each count, cannot be reversed on error if any count is good and is sufficient to support the judgment: Claasen *v.* U. S., 142 U. S. 140. As to the power of the court to instruct the jury to find a verdict for the defendant, see Merrick's Exr. *v.* Giddings, 115 U. S. 300; Butler *v.* Nat. Home for Soldiers, 144 *id.* 64; Tex. & Pac. R. Co. *v.* Cox, 145 *id.* 593; Toplitz *v.* Hedden, 146 *id.* 252; Del., L. & W. R. Co. *v.* Converse, 139 *id.* 469.

When a New Trial will be Awarded.

§ 359. Under the sanction of the Revised Statutes allowing the Supreme Court, on a review of a judgment or decree of the inferior court, to direct "such further proceedings to be had by the inferior court as the justice of the case may require," the court may, unquestionably, direct a trial to be had *de novo*, where in its opinion justice requires it. This was the practice under the Judiciary Act, and is in accordance with the practice at common law where the record did not furnish facts upon which to base a judgment. In such a case the statutes would require the court, in the exercise of its proper functions as an appellate court, and in furtherance of justice, to remand the cause for a new trial. If there is a demurrer to evidence, there should be a joinder in demurrer, and this supposes that the facts are admitted; the proper function of such a demurrer being to submit to the court the law arising from the facts. The party demurring to the evidence cannot insist upon a joinder in demurrer, under the common law practice, without distinctly admitting upon the record every fact and every conclusion which the evidence given for the adverse party conduces to prove; and if there should be a joinder in the demurrer, without such admission and a judgment thereon, the judgment would be reversed for this cause, and in such a case the appellate court would necessarily have to remand the cause for a new trial.[1] So, where the special verdict of a jury is too imperfect to enable the court to render a judgment upon it, although it may reverse the judgment of the court below, it will remand the cause, with directions to set aside the verdict and award a *venire facias de novo*.[2]

When a Cause will be Remanded for Amendments.

§ 360. In an action on the case, there was a plea of "non assumpsit," and the issue and verdict followed the plea. On error, it was held by this court that this defect was a material one and not cured by the verdict; that it did not contain enough of substance to put in issue the material parts of the declaration; that the judgment on the verdict was not properly rendered; and although this court would not direct amendments or a repleader,

[1] Gibson *v.* Hunter, 2 H. Bl. 187; Fowle *v.* Alexandria, 11 Wh. 320; Bank of U. S. *v.* Smith, *Ibid.* 171.

[2] McArthur *v.* Porter, 1 Pet. 626. See also Farr *v.* United States, 5 Pet. 373; Graham *v.* Bayne, 18 How. 60.

it reversed the judgment and remanded the case for further proceedings.[1] A new trial has sometimes been awarded in courts of error to enable parties to amend,[2] and in one case the court not only reversed a judgment and awarded a *venire de novo*, but gave "directions also to allow the parties liberty to amend their pleadings."[3]

The Mandate.

§ 361. It will be noticed that the Supreme Court, in the exercise of its jurisdiction on appeals from the inferior federal courts, does not possess the power to execute its judgments except in certain cases. It can only send a special mandate to the inferior federal court to award execution.

But on a writ of error to a state court, as we have noticed,[4] the court "may reverse, modify or affirm the judgment or decree of such state court, and may at their discretion award execution."

By Rule 39 mandate shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.[5]

Mandate Conclusive upon the Court Below.

§ 362. The court to which the mandate is directed must execute it according to its directions and the intentions of the appellate court. Where the mandate is uncertain and ambiguous in its terms, the court to which it is directed must exercise its judgment in the matter in the light of the opinion and decision of the appellate court and the reason and justice of the case. The authority of such appellate court or the jurisdiction of the inferior court to try the cause cannot be inquired into. Where the merits of the controversy are decided, and the mandate requires the execution of the decision, it is final.[6] Nor will a mandamus

[1] Garland *v.* Davis, 4 How. 131; Day *v.* Chism, 10 Wh. 404.

[2] United States *v.* Hawkins, 10 Pet. 125; Barnes *v.* Williams, 11 Wh. 416; Bellows *v.* Bank, 2 Mason 31; Peterson *v.* United States, 2 Wash. (C. C.) 36.

[3] United States *v.* Kirkpatrick, 9 Wh. 730; Mollan *v.* Torrance, *Ibid.* 537.

[4] See *ante*, § 355; Rev. Stat. § 709.

[5] See also Circ. Ct. of App. Rule 32.

[6] Skillern *v.* May, 6 Cr. 267; *Ex parte* Story, 12 Pet. 339; *Ex parte* Dubuque, etc., R. Co., 1 Wall. 69

in the nature of a *procedendo* be granted thereafter by the Supreme Court, to the judge of the court below, to compel him to sign a bill of exceptions in the case,[1] nor can such court entertain a petition for a rehearing of the case after a decision of the Supreme Court and the issue of a special mandate for its execution, as the court has no authority to disturb the final judgment or decree of the Supreme Court, and can only settle what remains to be done by the execution of the mandate.[2]

The Mandate may be Revoked.

§ 363. Notwithstanding the court below cannot question the authority of the Supreme Court in issuing the mandate, or disobey its requirements, the Supreme Court may, in a proper case, declare the judgment rendered by it null and void, and revoke the mandate. Thus, where an appeal from a circuit court was prosecuted, and a decree was rendered against the appellee without an appearance on his part, and a mandate was issued to the circuit court, and at a subsequent term it was made to appear that there had been no citation served upon the appellee, the court declared the former judgment null and void, and the mandate was revoked.[3]

This practice was followed in the subsequent case of United States *v.* Gomez.[4] The cause was docketed and dismissed on motion of the appellee and remanded, and a mandate sent down to the court below. A motion was afterwards made in the Supreme Court for the rescision of the order of dismissal and for a recall of the mandate; and the court being satisfied from

When a case has once been decided by the Supreme Court on appeal, and remanded to the circuit court, that court must execute the decree of the Supreme Court according to its mandate. If it does not, its action may be controlled, either by a new appeal or by writ of mandamus; but it may consider and decide any matters left open by the mandate, and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by the Supreme Court at the time of rendering its decree may be consulted to ascertain what was intended by the mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for the Supreme Court to construe its own mandate: *In re* Sanford Fork and Tool Co., 160 U. S. 247. And see *In re* Potts, 166 *id.* 263.

[1] *Ex parte* Story, 12 Pet. 339.

[2] Chaires *v.* United States, 3 How. 611.

[3] *Ex parte* Crenshaw, 15 Pet. 119.

[4] 23 How. 326 (1859).

the evidence before it that no appeal in the case had been granted by the court below, and that the cause was not properly before it when it was remanded at the instance of the appellee, it rescinded and annulled the decree of dismissal and revoked and cancelled the mandate.

Costs on Affirmance, Reversal, Dismissal.

§ 364. By the 24th rule, costs are allowed to the defendant in error or appellee, as the case may be, in all cases of dismissal, except where the dismissal is for the want of jurisdiction, unless otherwise agreed by the parties; and in all cases of the affirmance of the judgment or decree of the inferior courts, costs shall be allowed to the defendant in error or appellee, as the case may be, unless otherwise ordered by the court. But in case of a reversal of any such judgment or decree, costs are allowed to the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court; and the costs of the transcript of the record are a part of such costs. These provisions, however, do not apply to cases where the United States are a party. In such cases no costs will be allowed in the court for or against the United States.[1]

In case any suit is dismissed in the appellate court, it is the duty of the clerk to issue a mandate or other process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings of this court, so that such further proceeding may be had therein as law and justice may require; and it is his duty also to insert in such mandate or other proper process any costs that may be allowed in the court, and annex to it a bill of items of such costs taxed in detail.[2]

Recording the Opinions.

§ 365. The opinion of the court, upon the delivery thereof, must be recorded by the clerk immediately; and it is his duty

[1] Gen. Rule 24, paragraphs 1, 2, 3, 4. And see Circ. Ct. of App. Rule 31. Where both parties to an action at law seek the review of the judgment therein in a circuit court of appeals and by a written stipulation between them the cause is brought into the circuit court of appeals on one and the same bill of exceptions and record, the costs on the writs of error will be equally divided between them: Imperial Life Ins. Co. *v.* Newcomb, 19 U. S. App. 669; 27 *id.* 290.

[2] Gen. Rule 24, paragraphs 5, 6.

to furnish the reporter with a copy of the same as soon as it shall be recorded. This is required to be done during the term, in order to avoid delay in the publication of the reports. The original opinions must be filed with the clerk for preservation.

The statute further expressly provides that "where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs at its discretion;"[1] and that "there shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."[2]

If the writ is sued out merely for delay, damages will be allowed at the rate of not exceeding ten per cent. from the date of the judgment in the circuit court;[3] but damages for more than that sum cannot be given.[4] If every question involved in the case has been settled by former adjudications, this is satisfactory evidence that the writ has been sued out for delay, and damages will be allowed therefor.[5] But damages for a delay cannot be allowed on the affirmance of a decree in admiralty.[6]

Rehearing.

§ 366. It has been held that the court has no authority to reverse its own decisions;[7] yet, as we have seen, it has frequently exercised a revisory power over them, where it had no jurisdiction in fact, but had been induced to assume jurisdiction by fraud or mistake.[8]

[1] Rev. Stat. § 1010; Winchester *v.* Jackson, 3 Cr. 514; Himely *v.* Rose, 5 *id.* 313; McIver *v.* Wattles, 9 Wh. 650; Kilburn *v.* State Savings Inst., 22 How. 503; Hennessy *v.* Sheldon, 12 Wall. 440.

[2] Rev. Stat. § 1011. See Stafford *v.* Union Bank, 16 How. 135. This section does not forbid the review of a decision, even on a plea in abatement, of any question of the jurisdiction of the court below to render judgment against the defendant, though depending on the sufficiency of the service of the writ: Goldey *v.* Morning News, 156 U. S. 518.

[3] Gen. Rule 23, par. 2; Kilbourne *v.* State Savings Inst., 22 How. 503; Sutton *v.* Bancroft, 23 *id.* 320; Jenkins *v.* Banning, *Ibid.* 455; Prentice *v.* Pickersgill, 6 Wall. 511; Hall *v.* Jordan, 19 *id.* 271; Hennessy *v.* Sheldon, 12 *id.* 440; Gregory Consold. Min. Co. *v.* Starr, 141 U. S. 222.

[4] West Wisconsin R. Co. *v.* Foley, 94 U. S. 100.

[5] Penywit *v.* Eaton, 15 Wall. 380, 382.

[6] The Douro, 3 Wall. 564.

[7] Jackson *v.* Ashton, 10 Pet. 480.

[8] *Ex parte* Crenshaw, 15 Pet. 119; United States *v.* Gomez, 23 How. 326.

It has been further held that the practice in the English chancery courts relating to a rehearing has no application to the Supreme Court sitting as an appellate tribunal, as the nature and office of the two tribunals are different, and the same rules of practice for a rehearing would not be applicable to both.[1]

The Supreme Court has, however, in several cases allowed a rehearing, and in 1852, in the case last cited, the court ruled: "That no reargument will be heard in any case after judgment is entered, unless some member of the court who concurred in the judgment afterwards doubts the correctness of his opinion and desires a further argument on the subject. And when that happens, the court will of its own accord apprise the counsel of its wishes and designate the points on which it desires to hear them."[2] In 1869 this rule was extended so as to allow counsel to apply for a rehearing, in case the court does not order one. This rule, contained in an opinion of the court by Chief Justice Chase, is as follows: "Where the court does not on its own motion order a rehearing, it will be proper for counsel to submit without argument, as has been done in the present instance, a brief written or printed petition or suggestion of the point or points thought important. If upon such petition or suggestion any judge who concurred in the decision thinks proper to move for a rehearing, the motion will be considered. If not so moved, the rehearing will be denied as of course."[3] And now by Rule 30 it is provided that "a petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special order granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines."[4]

Adjournments.

§ 367. Rule 27 provides: "The court will at every session announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the court will take up no

[1] Brown *v.* Aspden, 14 How. 25.

[2] Brown *v.* Aspden, *supra*; United States *v.* Knight, 1 Black 489.

[3] Public Schools *v.* Walker, 9 Wall. 603.

[4] See also Circ. Ct. of App. Rule 29.

case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment."

Dismissal in Vacation; Duties of Clerk.

§ 368. Parties to a suit in the Supreme Court may have it dismissed in vacation. The attorneys of the respective parties who are entered on the record for this purpose may sign an agreement in writing, directing the clerk to dismiss the case, and specifying the terms on which it may be dismissed as to costs. After filing this with the clerk and the payment of the fees which may be due him in the cause, it is his duty to enter the case dismissed, and to give either party requesting it a copy of the agreement filed with him; but no mandate or other process can issue thereon without an order of the court.[1]

The Record on Appeal from the Court of Claims.

§ 369. On appeal from the Court of Claims, cases are heard upon the record, which must contain—

"1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments and decrees as may be necessary to a proper review of the case.

"2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record."[2]

Rule in Reference to the Record to be Strictly Observed.

§ 370. The transcript of the record must be prepared strictly in conformity with the rule prepared by the Supreme Court. Only such statement of facts found should be sent up as is necessary to enable the court to determine upon the correctness of the conclusions of law decided by the court below, based upon the facts found.[3] If the statement of facts found is not suffi-

[1] Gen. Rule 28. And see Circ. Ct. of App. Rule 20.

[2] Court of Claims Rule 1.

[3] De Groot *v.* United States, 5 Wall. 419.

cient, the Supreme Court will not dismiss the case, but remand it to the Court of Claims for a proper finding.[1]

Petition for the Allowance of an Appeal.

§ 371. The second rule in reference to the Court of Claims provided for appeals in cases of judgments or decrees rendered before the adoption of it, to wit, the December Term, 1865, in which cases it was necessary for a party desiring to appeal to make application by petition to the Court of Claims therefor. This rule is now probably obsolete, as there can be no cases to which it would be applicable.[2]

Order of Allowance; Time Limited.

§ 372. Appeals from the Court of Claims are not a matter of right, and can only be secured by application for an allowance of the same, to the Court of Claims or the Chief Justice thereof in vacation. This must be made within ninety days after the judgment is rendered;[3] but the limitation ceases from the time the application is made.[4] If, after an appeal has been allowed, a motion is made for a new trial, this is no ground for a dismissal of the appeal, unless the motion for a new trial prevails, in which case the appeal should be dismissed.[5] And the court may for good cause shown revoke an order allowing an appeal. The allowance in such a case does not absolutely remove the cause from the jurisdiction of the court so long as the record has not in fact been certified up to the appellate court.[6]

The only mode for the review of judgments of the Court of

[1] United States *v.* Adams, 6 Wall. 101.

[2] See Silverhill *v.* United States, 5 Ct. of Cl. 610.

[3] Rev. Stat. § 708.

[4] Ct. of Cl. Rule 3. See McNutt *v.* United States, 8 Ct. of Cl. 185. In suits in which, by the act of March 3, 1887, the jurisdiction of the Court of Claims is concurrent with that of the circuit and district courts, where the judgment or decree in one of the latter courts is adverse to the Government no appeal or writ of error is allowed after six months from such judgment or decree: Act of March 3, 1887, ch. 359, § 10, 24 Stat. L. 505, 1 Supp. R. S. 561.

[5] United States *v.* Ayers, 9 Wall. 608; United States *v.* Crussell, 12 *id.* 175; United States *v.* Young, 94 U. S. 258.

[6] *Ex parte* Roberts, 15 Wall. 384. An appeal cannot be taken from a decision granting a new trial: Young *v.* United States, 95 U. S. 641.

Claims provided by the statutes is on appeal, and the Supreme Court, therefore, has no power to review them on a writ of error.[1]

In Case of Diminution of Record.

§ 373. If either party should desire the court below to supply supposed defects in its fact conclusions deducible from the evidence, the proper practice would be to apply by motion for an order on the Court of Claims to make return as to the existence or non-existence of the particular facts set out in the motion; but a writ of certiorari would ordinarily issue on a proper application, alleging a diminution of record or writings.[2]

It is made the duty of the Court of Claims, in all cases where either party is entitled to an appeal, to make and file their findings of fact and their conclusions of law therein in open court, before or at the time they enter their judgment in the case; and in all such cases each party at such time, before the trial, as the court shall prescribe, must submit to the court a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of facts.[3]

[1] Latham's Appeal, 9 Wall. 145; United States *v.* Young, 94 U. S. 258. It is otherwise as to judgments in a circuit or district court in cases brought under the act of March 3, 1887, ch. 359. They may be brought by writ of error, but will be reëxamined only when the record contains a specific finding of facts with the conclusions of law thereon: Chase *v.* U. S., 155 U. S. 489.

[2] United States *v.* Adams, 9 Wall. 661.

[3] Ct. of Cl. Rules 4 and 5. A consideration of the jurisdiction, practice and procedure in the Court of Claims will be found in chapter xvi. *post.*

CHAPTER XVI.

COURT OF CLAIMS—JURISDICTION, PLEADING, PRACTICE AND PROCEDURE.

A Fundamental Principle: Governments or Sovereignties cannot be Sued.

§ 374. It is a familiar doctrine of the common law that a state, nation or sovereignty cannot be sued in its own courts without its consent.[1] It is manifest, however, that all civilized nations must, in the usual course of their affairs, enter into contracts, and, in the execution of their various functions and duties, become justly liable to private persons and corporations. Previous to the act of Congress of February 24, 1855, the only remedy for a party having a claim against our government was by petition to Congress for special legislative action in the particular case, and if granted, a particular appropriation was necessary to satisfy the same. The act providing for a Court of Claims was passed to remedy a great mischief, to avoid many grievous wrongs, and to promote justice, and it has been liberally construed to accomplish the object intended.[2] It provided for the organization and sessions of a Court of Claims, and gave it

[1] "Immunity from suit is an incident of sovereignty:" Mr. Justice Daniels, in Bonner *v.* United States, 9 Wall. 156; United States *v.* McLemore, 4 How. 286; Beers *v.* Arkansas, 20 *id.* 527; Hans *v.* Louisiana, 134 U. S. 1; McGahey *v.* Virginia, 135 *id.* 662. And where the government sues an individual no judgment on a plea of set off can be rendered against the government, although it may be judicially ascertained that on striking a balance of just demands the latter is indebted to the defendant in an ascertained amount; U. S. *v.* Eckford, 6 Wall. 484.

[2] Brown *v.* The United States, 6 Ct. C. C. 171; Cross *v.* U. S., 14 Wall. 479; Clark *v.* U. S., 95 U. S. 539. The Court of Claims is not a local but a national court, with jurisdiction throughout the United States, and a claim in suit in it is not a local asset: King *v.* U. S., 27 Ct. Cl. 529; Rutherford *v.* U. S., *Ibid.* 539. All United States courts are within its territorial jurisdiction: Peterson *v.* U. S., 26 *id.* 93.

jurisdiction to hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, and all claims which might be referred to it by either house of Congress;[1] and it made further provisions for practice and procedure in said court.[2] Since the original act for providing for this court was adopted, additional powers have at various times been conferred upon it, and additional regulations made as to practice and procedure therein; and a large amount of business is now annually transacted by it.[3]

Organization and Sessions of the Court of Claims.

§ 375. In regard to the organization and sessions of the Court of Claims, the Revised Statutes provide as follows:

JUDGES.—*Sec.* 1049. The Court of Claims, established by the act of February 24, 1855, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States and to discharge faithfully the duties of his office, and shall be entitled to receive an annual salary of four thousand five hundred dollars, payable quarterly from the treasury.[4]

SEAL.—*Sec.* 1050. The Court of Claims shall have a seal, with such device as it may order.

COURT-ROOMS, ETC., HOW PROVIDED.—*Sec.* 1051. It shall be

[1] Act of Feb. 24, 1855, ch. 122, § 1, v. 10, p. 612.

[2] A statement of the causes which led to the establishment of the Court of Claims, and an interesting and succinct history of the same, has been prepared by the Hon. William A. Richardson, Chief Justice of the court. The whole of this pamphlet (2d edition, 1885) is inserted at the end of this chapter.

[3] Congress can confer upon the Court of Claims powers not strictly judicial, such as those of a *quasi* international tribunal; but when its judgment may be reviewed in the Supreme Court, its decision must be confined to the legal rights of the parties: Western Cherokee Indians *v.* U. S., 27 Ct. Cl. 1.

[4] By act of March 3, 1881, ch. 130, par. 4, 21 Stat. L. 385, 1 Supp. R. S. 320, the salaries appropriated for the United States Court of Claims and Territorial judges may hereafter be paid monthly. And they "shall be paid monthly," by Act of July 31, 1894, ch. 174, § 13, 28 Stat. L. 162, 2 Supp. R. S. 218.

the duty of the Speaker of the House of Representatives to appropriate such rooms in the Capitol at Washington, for the use of the Court of Claims, as may be necessary for their accommodation, unless it appears to him that such rooms cannot be so appropriated without interfering with the business of Congress. In that case the court shall procure, at the city of Washington, such rooms as may be necessary for the transaction of their business.

SESSIONS.—*Sec.* 1052. The Court of Claims shall hold one annual session, at the city of Washington, beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the court.

QUORUM.—And any two of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business.[1]

OFFICERS OF THE COURT.—*Sec.* 1053. The said court shall appoint a chief clerk, an assistant clerk if deemed necessary, a bailiff and a messenger. The clerks shall take an oath for the faithful discharge of their duties, and shall be under the direction of the court in the performance thereof; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or, if not, at the next session. The bailiff shall hold his office for a term of four years, unless sooner removed by the court for cause.

SALARIES OF CLERKS, BAILIFF AND MESSENGER.—*Sec.* 1054. The salary of the chief clerk shall be three thousand dollars a year, of the assistant clerk two thousand dollars a year, of the bailiff fifteen hundred dollars a year, and of the messenger eight hundred and forty dollars a year, payable quarterly from the treasury.

CLERK'S BOND.—*Sec.* 1055. The chief clerk shall give bond to the United States in such amount, in such form and with such security as shall be approved by the Secretary of the Treasury.

CONTINGENT FUND.—*Sec.* 1056. The said clerk shall have authority, when he has given bond as provided in the preceding section, to disburse, under the direction of the court, the contingent fund which may from time to time be appropriated for its

[1] The act of 1874, ch. 468, requires three judges to make a quorum or enter any judgment.

use; and his accounts shall be settled by the proper accounting officers of the treasury in the same way as the accounts of other disbursing agents of the government are settled.

REPORTS TO CONGRESS; COPIES FOR DEPARTMENTS, ETC.—*Sec.* 1057. On the first day of every December session of Congress, the clerk of the Court of Claims shall transmit to Congress a full and complete statement of all judgments rendered by the court during the previous year, stating the amounts thereof and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. At the end of every term of the court he is required to transmit a copy of its decisions to the heads of departments; to the Solicitor, the Comptrollers and the Auditors of the Treasury; to the Commissioners of the General Land-Office and of Indian Affairs; and to the chiefs of bureaus, and to other officers charged with the adjustment of claims against the United States.

MEMBERS OF CONGRESS NOT TO PRACTICE IN THE COURT.—*Sec.* 1058. Members of either house of Congress shall not practice in the Court of Claims.

Jurisdiction, Pleading, Practice and Procedure of the Court of Claims.

§ 376. The Revised Statutes and the amendments thereof provide as follows in reference to the jurisdiction, powers and procedure of the Court of Claims:

JURISDICTION OF CLAIMS FOUNDED ON STATUTES OR CONTRACTS, OR REFERRED BY CONGRESS.—*Sec.* 1059. The Court of Claims shall have jurisdiction to hear and determine the following matters:[1]

First. All claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, and all claims which may be referred to it by either house of Congress.

JURISDICTION OF SET-OFFS AND COUNTER-CLAIMS OF UNITED STATES.—Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands what-

[1] See § 1 of the Tucker Act *infra*.

soever, on the part of the government of the United States against any person making claim against the government in said court.

JURISDICTION OF CLAIMS OF DISBURSING OFFICERS FOR LOSSES, ETC.—Third. The claim of any paymaster, quartermaster, commissary of subsistence or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of capture or otherwise, while in the line of his duty, of government funds, vouchers, records or papers in his charge, and for which such officer was and is held responsible.

JURISDICTION OF CLAIMS FOR CAPTURED AND ABANDONED PROPERTY.—Fourth. Of all claims for the proceeds of captured or abandoned property, as provided by the act of March 12, 1863, chapter 120, entitled, "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," or by the act of July 2, 1864, chapter 225, being an act in addition thereto; *provided*, that the remedy given in cases of seizure under the said acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said acts from suits at common law, or any other mode of redress whatever, before any court other than the said Court of Claims; *provided, also*, that the jurisdiction of the Court of Claims shall not extend to any claim against the United States growing out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion.

PRIVATE CLAIMS IN CONGRESS, WHEN TRANSMITTED TO COURT OF CLAIMS.—*Sec.* 1060. All petitions and bills praying or providing for the satisfaction of private claims against the government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, shall, unless otherwise ordered by resolution of the house in which they are introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents, to the Court of Claims.

JUDGMENTS FOR SET-OFF OR COUNTER-CLAIM, HOW ENFORCED.—*Sec.* 1061. Upon the trial of any cause in which any set-off, counter-claim, claim for damages or other demand is set up on the part of the government against any person making claim against the government in said court, the court shall hear and determine such claim or demand both for and against the government and claimant; and if upon the whole case it finds that the claimant is indebted to the government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any district or circuit court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court, and be enforced as other judgments in such courts are enforced.

DECREE ON ACCOUNTS OF PAYMASTERS, ETC.—*Sec.* 1062. Whenever the Court of Claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the treasury shall allow to such officer the amount so decreed, as a credit in the settlement of his accounts.

CLAIMS REFERRED BY DEPARTMENTS.—*Sec.* 1063. Whenever any claim is made against any executive department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege or exemption is claimed or denied under the Constitution of the United States, the head of such department may cause such claim, with all the vouchers, papers, proofs and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any auditor or comptroller of the Treasury, direct any account, matter or claim, of the

character, amount or class described in this section, to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to the said court, for trial and adjudication; *provided*, that no case shall be referred by any head of a department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant.[1]

PROCEDURE IN CASES TRANSMITTED BY DEPARTMENTS.—*Sec.* 1064. All cases transmitted by the head of any department, or upon the certificate of any auditor or comptroller, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the Court of Claims, and shall in all respects be subject to the same rules and regulations.

JUDGMENTS IN CASES TRANSMITTED BY DEPARTMENTS, HOW PAID. —*Sec.* 1065. The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the Court of Claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court.

CLAIMS GROWING OUT OF TREATIES NOT COGNIZABLE THEREIN. —*Sec.* 1066. The jurisdiction of the said court shall not extend to any claim against the government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.

CLAIMS NOT TO BE PROSECUTED BY PARTIES HAVING SUITS IN OTHER COURTS RESPECTING SAME AGAINST PERSONS ACTING FOR THE UNITED STATES.—*Sec.* 1067. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

[1] See Bowman Act, § 2, and Tucker Act, § 12, *infra*.

ALIENS.—*Sec.* 1068. Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction.

LIMITATION.—*Sec.* 1069. Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *provided*, that the claims of married women first accrued during marriage, or persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court, or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

RULES OF PRACTICE; CONTEMPTS.—*Sec.* 1070. The said court shall have power to establish rules for its government and for the regulation of practice therein, and it may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law.

OATHS AND ACKNOWLEDGMENTS.—*Sec.* 1071. The judges and clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same.

PETITION, WHAT TO SET FORTH.—*Sec.* 1072. The claimant shall, in all cases, set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had; what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim, or of any part thereof or interest therein, has been made, except as

stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; that the claimant, and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government, and that he believes the facts as stated in the said petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent or attorney.

PETITION TO BE DISMISSED IF ISSUE FOUND AGAINST CLAIMANT AS TO ALLEGIANCE, ETC.—*Sec.* 1073. The said allegations as to true allegiance and voluntary aiding, abetting or giving encouragement to rebellion against the government may be traversed by the government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed.

BURDEN OF PROOF AND EVIDENCE AS TO LOYALTY.—*Sec.* 1074. Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant asserting the loyalty of any such person to the United States during such rebellion shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be *prima facie* evidence that such person did give aid and comfort to said rebellion and to the persons engaged therein.

COMMISSIONERS TO TAKE TESTIMONY.—*Sec.* 1075. The Court of Claims shall have power to appoint commissioners to take testimony to be used in the investigation of claims which come before it; to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States.

POWER TO CALL UPON DEPARTMENTS FOR INFORMATION.—*Sec.* 1076. The said court shall have power to call upon any of the departments for any information or papers it may deem neces-

sary, and shall have the use of all recorded and printed reports made by the committees of each house of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest.

WHEN TESTIMONY NOT TO BE TAKEN.—*Sec.* 1077. When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not be the duty of the court to authorize the taking of any testimony therein.

WITNESSES NOT EXCLUDED ON ACCOUNT OF COLOR.—*Sec.* 1078. No witness shall be excluded in any suit in the Court of Claims on account of color.

EXAMINATION OF CLAIMANT.—*Sec.* 1080. The court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court, and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by the said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence on the trial thereof. And if any claimant, after such order is made, and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises.

TESTIMONY TAKEN WHERE DEPONENT RESIDES.—*Sec.* 1081. The testimony in cases pending before the Court of Claims shall be taken in the county where the witness resides, when the same can be conveniently done.

WITNESSES, HOW COMPELLED TO ATTEND BEFORE COMMISSIONERS.—*Sec.* 1082. The Court of Claims may issue subpœnas to require the attendance of witnesses in order to be examined before any person commissioned to take testimony therein, and

such subpœnas shall have the same force as if issued from a district court, and compliance therewith shall be compelled under such rules and orders as the court shall establish.

CROSS-EXAMINATION.—*Sec.* 1083. In taking testimony to be used in support of any claim, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded the claimant, in cases where testimony is taken on behalf of the United States, under like regulations.

WITNESSES, HOW SWORN.—*Sec.* 1084. The commissioner taking testimony to be used in the Court of Claims shall administer an oath or affirmation to the witnesses brought before him for examination.

FEES OF COMMISSOINER, BY WHOM PAID.—*Sec.* 1085. When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when it is taken at the instance of the government, such fees, together with all postage incurred by the Assistant Attorney-General, shall be paid out of the contingent fund provided for the Court of Claims, or other appropriation made by Congress for that purpose.

CLAIMS FORFEITED FOR FRAUD.—*Sec.* 1086. Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment or allowance of any claim or any part of any claim against the United States, shall *ipso facto* forfeit the same to the government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the government, and that the claimant be forever barred from prosecuting the same.

NEW TRIAL ON MOTION OF CLAIMANT.—*Sec.* 1087. When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

NEW TRIAL ON MOTION OF UNITED STATES.—*Sec.* 1088. The Court of Claims, at any time while any claim is pending before

it or on appeal from it, or within two years next after the final disposition of such claim, may on motion on behalf of the United States grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.

PAYMENT OF JUDGMENTS.—*Sec.* 1089. In all cases of final judgments by the Courts of Claims, or on appeal by the Supreme Court where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the Chief Justice, or in his absence by the presiding judge of said court.

INTEREST.—*Sec.* 1090. In cases where the judgment appealed from is in favor of the claimant, and the same is affimed by the Supreme Court, interest thereon at the rate of five per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid; but no interest shall be allowed subsequent to the affirmance, unless presented for payment to the Secretary of the Treasury as aforesaid.

The act of 1890 provides "that hereafter it shall be the duty of the Secretary of the Treasury to certify to Congress for appropriation only such judgments of the Court of Claims as are not to be appealed, or such appealed cases as shall have been decided by the Supreme Court to be due and payable. And on judgments in favor of claimants which have been appealed by the United States and affirmed by the Supreme Court, interest at the rate of four per centum per annum shall be allowed and paid from the date of filing the transcript of judgment in the Treasury Department up to and including the date of the mandate of affirmance by the Supreme Court; *Provided*, That in no case shall interest be allowed after the term of the Supreme Court at which said judgment was affirmed."[1]

[1] Act of Sept. 30, 1890, ch. 1126, par. 4, 26 Stat. L. 504, 1 Supp. R. S. 811.

INTEREST ON CLAIMS.—*Sec.* 1091. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

PAYMENT OF JUDGMENT A FULL DISCHARGE, ETC.—*Sec.* 1092. The payment of the amount due by any judgment of the Court of Claims and of any interest thereon allowed by law, as hereinbefore provided, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy.

FINAL JUDGMENTS A BAR.—*Sec.* 1093. Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

ATTORNEY-GENERAL TO TRANSMIT PETITION IN CERTAIN CASES TO DEPARTMENTS, ETC.—*Sec.* 188. In all suits brought against the United States in the Court of Claims founded upon any contract, agreement or transaction with any department, or any bureau, officer or agent of a department, or where the matter or thing on which the claim is based has been passed upon and decided by any department, bureau or officer authorized to adjust it, the Attorney-General shall transmit to such department, bureau or officer a printed copy of the petition filed by the claimant, with a request that the department, bureau or officer shall furnish to the Attorney-General all facts, circumstances and evidence touching the claim in the possession or knowledge of the department, bureau or officer.

Such department, bureau or officer shall, without delay and within a reasonable time, furnish the Attorney-General with a full statement, in writing, of all such facts, information and proofs.

The statement shall contain a reference to or description of all such official documents or papers, if any, as may furnish proof of facts referred to in it, or may be necessary and proper for the defence of the United States against the claim, mentioning the department, office or place where the same is kept or may be procured. If the claim has been passed upon and decided by the department, bureau or officer, the statement shall succinctly state the reasons and principles upon which such decision was

based. In all cases where such decision was founded upon any act of Congress, or upon any section or clause of such act, the same shall be cited specifically; and if any previous interpretation or construction has been given to such act, section or clause by the department, bureau or officer, the same shall be set forth succinctly in the statement, and a copy of the opinion filed, if any, shall be annexed to it. Where any decision in the case has been based upon any regulation of a department, or where such regulation has, in the opinion of the department, bureau or officer transmitting such statement, any bearing upon the claim in suit, the same shall be distinctly quoted at length in the statement.

But where more than one case, or a class of cases, is pending, the defence to which rests upon the same facts, circumstances and proofs, the department, bureau or officer shall only be required to certify and transmit one statement of the same, and such statement shall be held to apply to all such cases as if made out, certified and transmitted in each case respectively.

APPEALS TO SUPREME COURT.—*Sec.* 707. An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section 1086.

APPEALS; TIME AND MANNER OF TAKING.—*Sec.* 708. All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct.

ASSIGNMENT OF CLAIMS AGAINST UNITED STATES BEFORE ISSUE OF WARRANT VOID.—*Sec.* 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authority for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same.

CONTRACTS OF SECRETARIES OF WAR, NAVY AND INTERIOR TO BE IN WRITING, SIGNED, ETC.—*Sec.* 3744. It shall be the duty of the Secretary of War, of the Secretary of the Navy and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the government, or by their officers under them, appointed to make such contracts, to be reduced to writing and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the return office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return.[1]

THREE JUDGES TO CONSTITUTE A QUORUM, ETC.—That any three judges of the Court of Claims shall constitute a quorum; *provided*, that the concurrence of three judges shall be necessary to the decision of any case.[2]

COSTS OF RECORDS IN THE SUPREME COURT AND COURT OF CLAIMS, HOW TO BE PAID FOR.—There shall be taxed against the losing party in each and every cause pending in the Supreme Court of the United States, or in the Court of Claims of the United States, the cost of printing the record in such case, which shall be collected, except when the judgment is against the United States, by the clerks of said courts respectively, and paid

[1] See Rev. Stat. §§ 512–515.

[2] Act of June 23, 1874, ch. 468, 252, 18 Stat. L.

into the treasury of the United States; but this shall only apply to records printed after the first of October next.[1]

THE BOWMAN ACT.—The act of March 3, 1883, commonly called the Bowman act, provides as follows:

"SEC. 1. That whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either house of Congress, which involves the investigation and determination of facts, the committee or house may cause the same, with the vouchers, papers, proofs and documents pertaining thereto, to be transmitted to the Court of Claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or to the house by which the case was transmitted for its consideration.

"SEC. 2. That when a claim or matter is pending in any of the executive departments which may involve controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, proofs and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the department by which it was transmitted, for its guidance and action.

"SEC. 3. The jurisdiction of said court shall not extend to or include any claim against the United States growing out of the destruction or damage to property by the army or navy during the war for the suppression of the rebellion, or for the use and occupation of real estate by any part of the military or naval forces of the United States in the operations of said forces during the said war at the seat of war; nor shall the said court have jurisdiction of any claim against the United States which is now barred by virtue of the provisions of any law of the United States.[2]

"SEC. 4. In any case of a claim for supplies or stores taken by or furnished to any part of the military or naval forces of the

[1] Act of March 3, 1877, ch. 105, 18 Stat. L. 344.

[2] See Allen *v.* U. S., 27 Ct. Cl. 89; Peery *v.* U. S., 25 *id.* 274, 276.

United States for their use during the late war for the suppression of the rebellion, the petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did not give any aid or comfort to said rebellion, but was throughout that war loyal to the government of the United States, and the fact of such loyalty shall be a jurisdictional fact; and unless the said court shall, on a preliminary inquiry, find that the person who furnished such supplies or stores, or from whom the same were taken as aforesaid, was loyal to the government of the United States throughout said war, the court shall not have jurisdiction of such cause, and the same shall, without further proceedings, be dismissed.

"SEC. 5. That the Attorney-General or his assistants under his direction, shall appear for the defence and protection of the interests of the United States in all cases which may be transmitted to the Court of Claims under this act, with the same power to interpose counter-claims, offsets, defences for fraud practised or attempted to be practiced by claimants, and other defences, in like manner as he is now required to defend the United States in said court.

"SEC. 6. That in the trial of such cases no person shall be excluded as a witness because he or she is a party to or interested in the same.

"SEC. 7. That reports of the Court of Claims to Congress under this act, if not finally acted upon during the session at which they are reported, shall be continued from session to session and from Congress to Congress until the same shall be finally acted upon."[1]

It will be seen that departmental officers may, under this act, rid themselves of all controversies of law or fact in any matter which comes before them by having the secretary refer the same to the Court of Claims, where it will be judically investigated and determined. After receiving a report from the court, the department will have no responsibility but to be guided by the decision thus obtained and to act thereon. The act, being a remedial statute intended to give redress to the citizen and relief to Congress, is liberally construed.[2] A proceeding under it is an

[1] Act of March 3, 1883, ch. 116, 22 Stat. L. 485, 1 Supp R. S. 403.

[2] Duplantier *v.* U. S., 27 Ct. Cl. 323.

examination to ascertain facts, and is not based upon the strict legal rights of the parties.[1] But the findings of the Court of Claims may show, for the convenience of Congress, the relations of the facts to the law and advert to the law applicable to the facts.[2] Jurisdiction under the act is not limited to cases in which the legislative relief will be by the payment of money, nor to cases in which no other court or department has jurisdiction, but Congress intended to authorize either house or any committee to have the facts in any pending matter or business ascertained in the Court of Claims.[3]

THE TUCKER ACT.—The act of March 3, 1887, commonly called the Tucker act, provides as follows:

"SEC. 1. That the Court of Claims shall have jurisdiction to hear and determine the following matters:

"*First.* All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable:

"*Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, department or commission authorized to hear and determine the same.

"*Second.* All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court:

"*Provided*, That no suit against the Government of the United States shall be allowed under this act unless the same shall have

[1] Cofer *v.* U. S., 30 Ct. Cl. 131. See, as to the duty of the court, Moore *v.* U. S., 25 *id.* 82.

[2] Vance *v.* U. S., 30 Ct. Cl. 252.

[3] Taylor *v.* U. S., 25 Ct. Cl. 75.

been brought within six years after the right accrued for which the claim is made.

"SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

"SEC. 3. That whenever any person shall present his petition to the Court of Claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer, or agent or contractor so indebted, or that he, or the person for whom he is such surety, guarantor or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper Department of the Government requesting that the account of such office, agency or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said Department and to the Attorney-General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The Attorney-General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal,

or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court. Unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred.

"SEC. 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

[SECS. 5 and 6 refer to proceedings in the district and circuit courts.]

"SEC. 7. . . That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts.

"SEC. 8. That in the trial of any suit brought under any of the provisions of this act, no person shall be excluded as a witness because he is a party to or interested in said suit; and any plaintiff or party in interest may be examined as a witness on the part of the Government. Section ten hundred and seventy-nine of the Revised Statutes is hereby repealed. The provisions of section ten hundred and eighty of the Revised Statutes shall apply to cases under this act.

"SEC. 9. That the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.

[SEC. 10 refers to proceedings in the district and circuit courts.]

"SEC. 11. . . . That the Attorney-General shall report to Congress, and at the beginning of each session of Congress, the suits under this act in which a final judgment or decree has been rendered, giving the date of each and a statement of the costs taxed in each case.

"SEC. 12. That when any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law, the head of such Department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted.

"SEC. 13. That in every case which shall come before the Court of Claims, or is now pending therein, under the provisions of an act entitled, 'An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,' approved March third, eighteen hundred and eighty-three, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either House of Congress or to the Department by which the same was referred to said court.

"SEC. 14. That whenever any bill, except for a pension, shall be pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift or bounty to any person, the House in which such bill is pending may refer the same to the Court of Claims, who shall proceed with the same in accordance with the provisions of the act approved March third, eighteen hundred and eighty-three, . . . and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been

delay or laches in preventing such claim or applying for such grant, gift or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy.

"SEC. 15. If the Government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court.

"SEC. 16. That all laws and parts of laws inconsistent with this act are hereby repealed." [1]

This act does not authorize a reference of a "claim or matter" and is not an amendment of the Bowman act. The reference to the latter act in section 14 is to obtain rules of procedure, and not as a limitation upon jurisdiction. A resolution should show whether the subject of investigation is "transmitted" under the one statute or "referred" under the other. But if the intent appears that the investigation shall be under the Tucker act, the court will give effect to it, notwithstanding defects and ambiguities in the resolution.[2] The object of section 3 is to secure a speedy and final settlement of the Government's demands. In such a suit there can be no affirmative judgment in favor of the claimant.[3] The subject of pensions is specially excepted from the jurisdiction of the court.[4]

FRENCH SPOLIATIONS.—By the act of January 20, 1885, it is provided:

"That such citizens of the United States, or their legal representatives, as had valid claims to indemnity upon the French Government arising out of illegal captures, detentions, seizures, condemnations and confiscations prior to the ratification of the

[1] Act of March 3, 1887, ch. 359, 24 Stat. L. 505, 1 Supp. R. S. 559.

[2] Dowdy *v.* U. S., 26 Ct. Cl. 220. The provision as to claims founded upon the Constitution is new, making the constitutional obligations of the Government to the citizen the subject of jurisdiction and extending to obligations for the occupation or taking of real property: Stovall *v.* U. S., 26 Ct. Cl. 226.

[3] Gerding *v.* U. S. 26 Ct. Cl. 319; 28 *id.* 531.

[4] See Gordon *v.* U. S., 26 Ct. Cl. 307; Cole *v.* U. S., 29 *id.* 47.

convention between the United States and the French Republic concluded on the thirtieth day of September, eighteen hundred, the ratifications of which were exchanged on the thirty-first day of July following, may apply by petition to the Court of Claims, within two years from the passage of this act, as hereinafter provided: *Provided*, That the provisions of this act shall not extend to such claims as were embraced in the convention between the United States and the French Republic concluded on the thirtieth day of April, eighteen hundred and three; nor to such claims growing out of the acts of France as were allowed and paid, in whole or in part, under the provisions of the treaty between the United States and Spain concluded on the twenty-second day of February, eighteen hundred and nineteen; nor to such claims as were allowed, in whole or in part, under the provisions of the treaty between the United States and France concluded on the fourth day of July, eighteen hundred and thirty-one."

The court is to make all necessary rules and regulations and to examine into the validity, amount, etc., of the claims, receiving all suitable testimony and proper evidence, historic and documentary; and it is to decide upon the validity of the claims according to municipal and international rules of law, and United States treaties applicable, and report all such conclusions of fact and law as in their judgment may affect the liability of the United States therefor. The Attorney-General is to appear and resist claims; the Secretary of State is to procure evidence from abroad; yearly reports of the facts found by the court and its conclusions thereon are to be made, which finding and report are, however, to be taken merely as advisory as to the law and facts found, and not to conclude either the claimant or Congress. Claims not presented within the period of two years are to be forever barred and nothing in the act is to be construed as committing the United States to the payment of any such claims.[1]

The act of March 3, 1891, provides that the awards in the cases of individual French Spoliation claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations, respectively, shall have certified that

[1] Act of Jan. 20, 1885, ch. 25, 23 Stat. L. 283, 1 Supp. R. S. 471.

the legal representatives have given adequate security for the legal disbursement of the awards. In all cases where the original sufferers were adjudicated bankrupts the award is to be made on behalf of the next of kin instead of to the assignees in bankruptcy.[1]

The act of 1885 confers jurisdiction, but does not assume liabilities. The fact that several classes of claimants might come into the Court of Claims and have the question of the liability of the United States determined was the only thing that Congress conceded.[2] The decisions of that court under the statute are neither judgments nor awards, but simply the determination of abstract rights for the information and guidance of Congress.[3] The intent of the act of 1891 is that the court shall do more than find that an administrator has been appointed by a competent court, viz., shall protect the next of kin from any evasion or sacrifice of right. The certificate does not determine the rights of beneficiaries, nor whether legatees or next of kin take, but merely that there are next of kin and that the administrator represents them. The purpose of the statute was to prevent the payment of money to an administrator who represents nobody, or only creditors or assignees in bankruptcy. But the final determination of the right is not within the jurisdiction of the court and cannot be made on an *ex parte* application for a certificate which in legal effect merely authorizes payment to a personal representative.[4] Under this act the creditors of bankrupts are to be ignored as beneficiaries in French Spoliation cases and the administrator of the original sufferer, representing his next of kin, is to be alone regarded.[5] The administrator representing the widow's or legatee's next of kin is not entitled to relief.[6]

[1] Act of March 3, 1891, ch. 540, § 4, 26 Stat. L. 862, 1 Supp. R. S. 925.

[2] Field *v.* U. S., 27 Ct. Cl. 224. As to who is an original loser, see Adams *v.* U. S , 26 *id.* 249.

[3] Durkee *v.* U. S., 28 Ct. Cl. 326; Van Wagenen *v.* U. S., 25 *id.* 110; Adams *v.* U. S., 26 *id.* 290. See Whitney *v.* U. S., 27 *id.* 122, with regard to the provision concerning the treaty of 1819; and U. S. *v.* Gilliat, 164 U. S. 42, with reference to the interpretation of a special act.

[4] Hooper *v.* U. S., 28 Ct. Cl. 480. And see Adams *v.* U. S., 26 *id.* 290. The record of the probate court alone is not sufficient to establish the fact that the administrator represents the next of kin: Eldridge *v.* U. S., *Ibid.* 253.

[5] Van Wagenen *v.* U. S., 31 Ct. Cl. 175; Henry *v.* U. S., 27 *id.* 142; Vanuxem *v.* U. S., *Ibid.* 328.

[6] Durkee *v.* U. S., 28 Ct. Cl. 326.

INDIAN DEPREDATIONS.—By the act of March 3, 1891, it is provided:

"SEC. 1. That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

"*First.* All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

"*Second.* Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject, however, to the limitations hereinafter provided.

"*Third.* All just offsets and counter claims to any claim of either of the preceding classes which may be before such court for determination.

"SEC. 2. That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government:

"*Provided*, That no claim accruing prior to July first, eighteen hundred and sixty-five, shall be considered by the court unless the claim shall be allowed or has been or is pending, prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent, sub-agent or commissioner, authorized under any act of Congress to inquire into such claims; but no case shall be considered pending unless evidence has been presented therein: *And provided further*, That all claims existing at the time of

the taking effect of this act shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred: *And provided further*, That no suit or proceeding shall be allowed under this act for any depredation which shall be committed after the passage thereof."

In the subsequent sections of the act it is provided that all claims shall be presented to the court by petition setting forth the facts, which is to be served upon the Attorney-General, who shall defend the Government and the Indians. He is to file pleadings within sixty days, but, on his failure to do so, the claimant may proceed, but shall not have judgment except upon satisfactory proof. Indians interested in the suit may employ a special attorney. Papers relating to claims on file in the departments or courts may be read as evidence, but certain allowed claims are to have priority and judgments for the amounts found due therein rendered unless either party elects to reopen. The rules for taking testimony are to be made by the court. Parties and interested persons are, however, to be considered competent witnesses. The court is to determine the value of the property destroyed and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and to render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong when such can be identified. The judgment is to be charged against the tribe and paid in the manner prescribed. Such judgments are final and not to be questioned unless a new trial or rehearing is granted by the court or the judgment is reversed or modified upon appeal in the way provided in the statute. Sales, transfers or assignments of the claims, except such as have occurred in the due administration of decedents' estates, are declared void, as well as certain attorneys' contracts. The warrants issued in payment of the judgments are to be payable and delivered only to the claimant or his heirs or representatives, except the amount allowed to attorneys. The rights of appeal are the same as in other cases. All papers and records in the departments or before Congress, relating to these claims, are to be furnished to the court upon its order or at the Attorney-General's request. An additional Assistant Attorney-General is appointed, to facili-

tate the disposition of these cases. The investigation of such claims under acts heretofore in force is to cease. A list of the final unpaid judgments rendered under this act in favor of claimants is to be transmitted by the Attorney-General to Congress immediately after the beginning of each session, and they are to be thereupon appropriated for in the proper appropriation bill.[1]

Under this act the United States is responsible only in two classes of cases: 1st. Where the Indian defendants are responsible but without funds to respond in damages; 2d. Where the depredations were committed by Indians whose tribal relations cannot be ascertained.[2] In the latter case, where the impossibility of identification is stated, judgment may be rendered against the United States alone.[3] But the Court of Claims has power to bring in a new Indian defendant after the statutory period for bringing suits has expired. When a suit is brought and its cause of action defined according to the act, the case is subject to the court's power of amendment, and this includes the power to bring in a tribe at any time before judgment.[4] So a judgment against an Indian tribe may be made definite and certain by an additional finding of fact designating the band.[5]

The jurisdiction of the court is limited to "claims for property of citizens." This means citizens at the time the property was taken. The primary declaration of an alien, followed by his subsequent naturalization, does not constitute him a citizen in the sense of the act.[6] The act was framed in accordance with the general policy of all governments not to pay for property destroyed in war;[7] and the fact that the depredation was an act

[1] Act of March 3, 1891, ch. 538, 26 Stat. L. 851, 1 Supp. R. S. 913. The compensation of the Assistant Attorney-General is increased by act of July 13, 1892, ch. 164, § 1, par. 2, 27 Stat. L. 120, 2 Supp. R. S. 33; and act of Dec. 21, 1893, ch. 3, par. 2, 28 Stat. L. 16, 2 Supp. R. S. 164.

[2] Woolverton *v.* U. S. & Nez Perce Indians, 29 Ct. Cl. 107; Love *v.* U. S., *et al.*, *Ibid.* 332.

[3] U. S. *v.* Gorham, 165 U. S. 316. But not otherwise: Garrison *v.* U. S. & Creek Indians, 30 Ct. Cl. 272.

[4] Duran *v.* U. S. & Apache Indians, 31 Ct. Cl. 353.

[5] Valencia *v.* U. S. & Apache Indians, 31 Ct. Cl. 388; Graham *v.* U. S., 30 *id.* 318. And see Marks *v.* U. S., 161 U. S. 297.

[6] Valk *v.* U. S. & Rogue River Indians, 28 Ct. Cl. 241; Johnson *v.* U. S., 160 U. S. 546; Marks *v.* U. S., 161 *id.* 297.

[7] Valk *v.* U. S., *et al.*, 29 Ct. Cl. 62. And jurisdiction does not extend to a tribe carrying on hostilities though for the special purpose of resisting

of war is a good defence, whether the claim was or was not examined and allowed by the Secretary of the Interior.[1] A treaty is some evidence of amity, but is not conclusive.[2] A general amnesty of all past offences takes Indians out of the operation of the act.[3] Nor are they liable where malicious intent or common law negligence is not established.[4]

The finding and allowance of the Interior Department become an award, forming the basis of a judgment in which all differences in fact and law are merged. But the Court of Claims by its judgment determines no questions applicable to the original controversy.[5] Where a claim reported by the Secretary of the Interior to Congress was described in a schedule which contained no column for allowances, the court will refer to the action of the Interior Department to determine whether it was approved and allowed within the meaning of the statute.[6] Where the Secretary approved a claim upon the merits, but disallowed it on the ground that it had not been presented within the time prescribed by law, his disallowance is one of the "limitations as to time and manner of presenting claims" expressly waived by the act.[7] Where a depredation was committed prior to July, 1865, the demand prosecuted in the Court of Claims may exceed in amount, but not in quantity, the claim filed in the Interior Department.[8] The service of the petition on the Attorney-General is the only service of process required, and the Indians are not entitled to other notice. The United States as defendant is entitled to reasonable time to prepare its defence.[9] The costs cannot be regulated by contract;[10] and only attorneys who have actually appeared are entitled to an allowance of fees.[11]

the opening of a military road: Leighton *v.* U. S., 161 U. S. 291.

[1] Cox *v.* U. S. & Bannock Indians, 29 Ct. Cl. 349.

[2] Valk *v.* U. S. & Rogue River Indians, 29 Ct. Cl. 62; Marks *v.* U. S., 161 U. S. 297.

[3] Garrison *v.* U. S. & Creek Indians, 30 Ct. Cl. 272.

[4] Jaeger *v.* U. S. & Yuma Indians, 29 Ct. Cl. 172.

[5] Hyne *v.* U. S., 27 Ct. Cl. 113.

[6] Price *v.* U. S., 28 Ct. Cl. 422.

[7] Mitchell *v.* U. S., 27 Ct. Cl. 316. As to what constitutes approval and allowance, see Buchanan *v.* U. S. & Apache Indians, 28 Ct. Cl. 127; Falk *v.* U. S., 27 *id.* 321.

[8] Barrow, Porter & Co. *v.* U. S. *et al.*, 30 Ct. Cl. 54.

[9] Jaeger *v.* U. S., 27 Ct. Cl. 278.

[10] Redfield *v.* U. S., 27 Ct. Cl. 473.

[11] Beddo *v.* U. S., 28 Ct. Cl. 69.

Jurisdiction of a less important kind has been conferred on the court by special statutes.[1]

Jurisdiction Limited; No Jurisdiction in Case of Torts.

§ 377. It will be observed that the jurisdiction of the Court of Claims is limited to certain matters. Beyond these it cannot take cognizance of cases. It has no jurisdiction of suits founded upon torts. Thus, it cannot take cognizance of a cause based upon the wrongful act of an officer of the United States, as for a claim arising from false imprisonment by one of its officers, or for damages sustained by the bombardment of a town;[2] or for the wrongful and forcible possession of land taken by the United States;[3] or for damages arising from a collision with a vessel of the United States.[4] But under the peculiar circumstances of the case, where the government in an emergency took private

[1] The following cases are referred to as interpreting some of these special acts: Acts of June 16, 1880, 21 Stat. L. 284, and Feb. 13, 1895, 28 Stat L. 664, with regard to claims against the District of Columbia; see Hall *v.* Dist. of Col., 31 Ct. Cl. 376; Johnson *v.* Dist. of Col., *Ibid.* 395; Dickson *v.* Dist. of Col., *Ibid.* 399. Pottawatomie Indians Act, March 1, 1890: see Pottawatomie Indians *v.* U. S., 27 Ct. Cl., 403. Cherokee Act, Oct. 1, 1890: see Journeycake *v.* Cherokee Nation, 31 Ct. Cl. 140. Act of March 2, 1895, ch. 188, regulating Crow Creek Reservation cases: see Schewson *v.* U. S., 31 Ct. Cl. 192. Weil and La Abra Act, 1892: see U. S. *v.* La Abra Silver Mining Co., 29 Ct. Cl. 432; U. S. *v.* Weil, *Ibid.* 523.

[2] Gibbons *v.* United States, 8 Wall. 269; s. c., 2 Ct. Cl. 421; Spicer *v.* United States, 1 Ct. Cl. 316; Perrin *v.* United States, 12 Wall. 315. In U. S. *v.* Cumming, 130 U. S. 452, it was held that where Congress permitted a party to sue the government and by the same act directed the Court of Claims to pass upon the law and facts as to the liability of the United States for the acts of its officers, this was a waiver of the statute of limitations merely, but not a waiver of any defence based upon the general principle of law that the United States is not liable for unauthorized wrongs inflicted on the citizen by its officers while engaged in the discharge of official duties. See also German Bank *v.* U. S. 148 U. S. 573. For cases "sounding in tort" under the Tucker act, see Lanman *v.* U. S., 27 Ct. Cl. 260; Gibson *v.* U. S., 29 *id.* 18; McArthur *v.* U. S., *Ibid* 191; Hayward *v.* U. S., 30 *id.* 219; Johnson *v.* U. S., 31 *id.* 262. See also Schillinger *v.* U. S., 155 U. S. 163.

[3] Langford *v.* United States, 101 U. S. 341. See Stovall *v.* U. S., 26 Ct. Cl. 226, with regard to the effect of the Tucker act on the taking of real property.

[4] Dennis *v.* United States, 2 Ct. Cl. 210. See also United States *v.* Bostwick, 94 U. S. 53; s. c., 12 Ct. Cl. 67.

property for public use, it was held, that there was an implied promise to compensate the owner therefor, and that the Court of Claims had jurisdiction of a claim based thereon.[1]

No Jurisdiction in Equity Cases.

§ 378. No provision is made by the section under consideration for the exercise of any equitable jurisdiction by the Court of Claims, and hence it cannot take cognizance of causes involving an investigation of equitable rights set up by claimants against the United States.[2] In Bonner *v.* United States, cited in the last note, Mr. Justice Davis observes: "Congress did not think proper to part with the consideration of such questions, but wisely reserved to itself the power to dispose of them. Immunity from suit is an incident of sovereignty; but the government of the United States in a spirit of great liberality waived that immunity in favor of those persons who had claims against it which were founded upon any law of Congress or regulation of an executive department, or upon any contract with it, express or implied, and gave the Court of Claims the power to hear and determine claims of this nature."

Its Jurisdiction of Claims arising under the Revenue Laws.

§ 379. No provision is made by the section of the statute conferring jurisdiction on the Court of Claims to take cognizance of claims arising under the revenue laws. If there is a claim growing out of the administration of these laws, the statute points out the remedy, which must be pursued by those aggrieved thereby. But the Court of Claims has no jurisdiction of such

[1] United States *v.* Russell, 13 Wall. 623. And see Morris *v.* U. S., 30 Ct. Cl. 162; U. S. *v.* Alexander, 148 U. S. 186.

[2] Bonner *v.* United States, 9 Wall. 156; s. c., 1 Ct. Cl. 125. But see also Tillson *v.* United States, 100 U. S. 43; Harvey's Case, 13 Ct. Cl. 322. Nor has this court jurisdiction of a case against the government to recover a military land warrant: United States *v.* Alire, 6 Wall. 573. Nor of a case for merely nominal damages arising for a breach of contract: Grant *v.* United States, 7 Wall. 331. Nor of a writ in equity to set aside a sale of land made by a third party on the ground that it was in fraud of the rights of the present claimants: Jackson *v.* U. S., 27 Ct. Cl. 74. The only judgment which the Court of Claims can render is one for money found due to the petitioner from the government: United States *v.* Alire, 6 Wall. 573; s. c., 1 Ct. Cl. 233.

cases.[1] The government has entrusted the determination of such matters to certain specified officers, and a final hearing therein to other tribunals.[2] Thus an importer cannot maintain an action in said court to recover a duty upon imported goods, although the duty was illegal.[3] Nor can a distiller prosecute an action therein to recover a claim on account of leakage.[4]

But this court may take cognizance of claims growing out of the administration of the internal revenue laws, where they are based upon a law of Congress, or upon any regulation of the executive department, or upon a contract, express or implied, with the government of the United States, and especially where there is no redress elsewhere.[5]

Thus, the Court of Claims may entertain a petition by an assessor of internal revenue to recover money deposited with a collector to secure a compromise of a prosecution against the former, if the compromise fails and the money is covered into the treasury of the United States.[6] So it has jurisdiction of a claim of an informer to recover his share of a forfeiture under the revenue laws;[7] and especially if the money arising from the forfeiture has been covered into the treasury of the United States.[8] So a manufacturer of articles required to be stamped under the revenue laws may recover in this court commission on stamps allowed by said laws.[9] And an importer may recover money deposited by him with a collector of duties in excess of the duties on goods received by him.[10] So one who by statute is

[1] Nichols *v.* United States, 7 Wall. 122.

[2] Broughton *v.* United States, 12 Ct. Cl. 330. If there is discretionary power given to an officer to remit penalties under the revenue laws, the Court of Claims can have no jurisdiction of a claim against the government based thereon: Dorsheimer *v.* United States, 7 Wall. 167.

[3] Nichols *v.* United States, 7 Wall. 122; De Celis *v.* United States, 13 Ct. Cl. 117; Doherty *v.* United States, 6 Ct. Cl. 90.

[4] Turner *v.* United States, 9 Ct. Cl. 307.

[5] Brown *v.* United States, 6 Ct. Cl. 171. Where the right to recover rests upon a statute and does not require the action of a revenue officer to fix the amount, the case is not a revenue case and the court has jurisdiction: Durant *v.* U. S., 28 *id.* 356.

[6] Broughton *v.* United States, 12 Ct. Cl. 330.

[7] Shelton *v.* United States, 8 Ct. Cl. 487.

[8] Bradley *v.* United States, 12 Ct. Cl. 578.

[9] Dailey *v.* United States, 7 Ct. Cl. 383.

[10] Broulatour *v.* United States, 7 Ct. Cl. 555.

entitled to a drawback on imported goods, may, when payment has been refused, maintain a suit therefor in the Court of Claims.[1]

Claims Founded upon any Law of Congress or any Regulation of an Executive Department.

§ 380. The statute provides for the jurisdiction of the Court of Claims where the claim is founded upon any act of Congress. If such a claim should be rejected by an executive department, it could still be prosecuted in this court.[2] Thus, an officer of the government may prosecute a claim in this court for a salary allowed him by an act of Congress.[3] So where, by a law of Congress, the United States had assumed the payment of certain bonds of the state of Texas, it was held that an action thereon could be maintained by the payee in this court, although they had been lost or stolen and without endorsement had been paid to the holder.[4]

A "regulation of an executive department" may, under the statute of the United States conferring that power, have the force and effect of law; and it is such a regulation that is meant by the language of the statute. It relates to regulations on which the department has a right to act, and made by such department.[5]

Jurisdiction in Case of Claim upon Contract.

§ 381. The court has jurisdiction of all claims founded upon express or implied contracts with the government. Few contro-

[1] Campbell *v.* U. S., 107 U. S. 407; Durant *v.* U. S., 28 Ct. Cl. 356, overruling, in effect, the earlier case of Portland Co. *v.* U. S., 5 Ct. Cl. 441.

[2] Alire *v.* United States, 1 Ct. Cl. 233; Bogert *v.* United States, 3 *id.* 18.

[3] Moore *v.* United States, 4 Ct. Cl. 139. And see U. S. *v.* Langston, 118 U. S. 389; U. S. *v.* Hill, 120 *id.* 169; Page *v.* U. S., 127 *id.* 67; Wallace *v.* U. S., 133 *id.* 180. The approval of an officer's account by a circuit or district court merely determines the fact that the services were rendered. It is the duty of the Court of Claims, when the account is brought there, to pass upon the legality of every contested item, and this extends to every question which can be raised concerning the right to recover: Zabriskie *v.* U. S., 29 Ct. Cl. 188. The jurisdiction will not be exercised where the officer's account stands suspended for explanation in the Treasury, but will be exercised when the Comptroller refuses to act: Cameron *v.* U. S., 30 *id.* 340.

[4] Morrell *v.* United States, 7 Ct. Cl. 421.

[5] Harvey *v.* United States, 3 Ct. Cl. 38. But an order assigning duties to a clerk in a department was held not to be a "regulation of an executive department:" *Ibid.*

versies have arisen under this ground of jurisdiction where the contract was express, but many cases have occurred in relation to implied contracts. In a case of a lease of property by the United States, where the lessor claimed damages for the negligent use or want of reasonable care in the use of the property by the United States, it was held that this court could take cognizance of the claim.[1] So if the United States refuse to accept goods according to an express contract with a party, by which the latter suffers damages, a claim for the same may be maintained in this court.[2] And where the United States took possession of real property under a contract of purchase made with an officer of the government who had no authority to make it, but which purchase was ratified by an act of Congress, this was held to make the contract binding from the time of ratification, but not to make the United States liable for the rent of the property from the time of purchase to the time of ratification.[3]

Jurisdiction in Case of Implied Contract.

§ 382. Controversies have arisen as to the jurisdiction of this court on claims based upon alleged implied contracts with the government. The claim, as we have already shown, must be for money, and to constitute an implied contract for the payment of money there must necessarily be some consideration therefor; and an implied contract cannot in any case arise out of the acts of an agent who has no authority to make an express contract.[4] If the claim is for money received by the United States, it must also appear that they are charged with a duty to pay it over to the claimant; and in case of money paid by mistake, it must appear that the claimant had a lawful right to it when it was received by the United States.[5] And money erroneously exacted of a claimant, where no other specific remedy is provided, may

[1] United States *v.* Bostwick, 94 U. S. 53; s. c., 12 Ct. Cl. 67.

[2] Gibbons *v.* United States, 8 Wall. 269; s. c., 2 Ct. Cl. 421.

[3] Carpenter *v.* United States, 17 Wall. 489; s. c., 6 Ct. Cl. 18. But see Moore *v.* United States, 10 Ct. Cl. 375, where the owner of land was allowed to maintain an action in the Court of Claims to recover the rent and income thereof.

[4] Pitcher *v.* United States, 1 Ct. Cl. 7. But the United States may be liable if they ratify and receive the benefits of such a contract: De Celis *v.* U. S., 13 *id.* 117.

[5] Knote *v.* United States, 95 U. S. 149; s. c., 10 Ct. Cl. 397.

be recovered in this court, as such a claim is based upon an implied contract to repay the same.[1]

Instances where the Court took Cognizance of Cases Based upon Implied Contracts.

§ 383. Where the United States had entered upon land and used the same, without any express contract therefor, the owner was allowed to prosecute in this court, on the implied contract to pay for the use of the same.[2] So where the United States chartered a vessel of the owner and then appropriated it to their own use, under the provisions of the charter party, the owner was allowed to prosecute a claim for its value in this court.[3] So where the United States received goods through a fraud of their agent, the owner was allowed to prosecute an action in this court therefor.[4] So if a contract made by one person for goods to be delivered by another person to the United States is void, still the person who delivers the goods to the latter may recover upon an implied contract to pay for the same.[5] So if an officer of the United States, under an urgent and immediate necessity in the discharge of his duty, takes private property for public use (except in the cases mentioned in the statute, where property was taken by the army or navy, engaged in the suppression of the rebellion), there is an implied promise to pay for the same, and the owner may maintain an action therefor in this court.[6] So a person who has rendered salvage service in saving property of the United States may claim compensation therefor, and this court will take cognizance of the claim as one based upon an implied contract.[7] So a person who had paid a fine pursuant to an unlawful sentence of a military commission, organized in a state contrary to law, at a time when the courts were open, was allowed to prosecute his claim in this court for the fine so paid.[8] And the party

[1] Schlesinger *v.* United States, 1 Ct Cl. 16. But see Nichols *v.* U. S., 7 Wall. 122; De Celis *v.* U. S., 13 Ct. Cl. 117.

[2] Johnson *v.* United States, 4 Ct. Cl. 248.

[3] Bogert *v.* United States, 2 Ct. Cl. 159; Bogert *v.* United States, 3 *id.* 18.

[4] United States *v.* State Bank, 96 U. S. 30.

[5] Heathfield *v.* United States, 8 Ct. Cl. 213.

[6] United States *v.* Russell, 13 Wall. 623; s. c., 5 Ct. Cl. 121; Grant *v.* United States, 1 Ct. Cl. 41.

[7] Bryan *v.* United States, 6 Ct. Cl. 128.

[8] Devlin *v.* United States, 12 Ct. Cl. 266.

who claims for an excess in the payment of a special tax, which has been allowed by the Commissioner of Internal Revenue, may maintain an action in this court therefor.[1]

Instances where the Court would not Entertain Jurisdiction on a Claim of Implied Contract.

§ 384. This court refused to entertain a claim for a recovery of property confiscated by the army during the rebellion, although the claimant had been pardoned.[2] So where the United States took possession of lands under a treaty, and as trustee for the Indians, it was held that a claimant of the same could not prosecute in this court to recover compensation therefor as owner of the same.[3] So a person who attends as a witness before either house of Congress cannot maintain an action against the United States for his fees.[4] And where an officer of the government took forcible possession of land for public use, it was held that he was thereby guilty of a tort, and that as no implied contract could arise therefrom, this court could have no jurisdiction of a claim based thereon.[5]

Actions for Infringement of Patents.

§ 385. It will be manifest from the statutory provisions conferring jurisdiction upon the Court of Claims, and the authorities heretofore referred to construing those provisions, that no action could be maintained in that court to recover damages against the United States for the infringement of a patent.[6] Where the warden of a penitentiary used a machine that infringed a patent, and paid the proceeds arising from the sale of articles made therewith to the United States, it was held that the patentee could not prosecute a claim to recover the profits of such manufacture and sale in this court. But if the United States, through their duly constituted agents, agree to pay a patentee or his

[1] United States *v.* Kaufman, 96 U. S. 567; s. c., 11 Ct. Cl. 659. See Nichols *v.* U. S., 7 Wall. 122.

[2] Knote *v.* United States, 95 U. S. 149; s. c., 10 Ct. Cl. 397.

[3] Langford *v.* United States, 12 Ct. Cl. 338. And, in general, where the government takes property avowedly as its own, no contract can be implied: Merriam *v.* U. S., 29 *id.* 250.

[4] Lilley *v.* United States, 14 Ct. Cl. 539.

[5] Langford *v.* United States, 101 U. S. 341.

[6] Fletcher *v.* United States, 11 Ct. Cl. 748.

assignee for the use of a patented invention a certain amount of royalty, then the patentee or assignee of such patentee, as the case may be, can recover on the contract the amount agreed to be paid, and the Court of Claims would take cognizance of the case.[1] And if a patentee should offer his invention to the United States, and they through their duly constituted officers and agents should act upon the offer and adopt and use the invention, the former could maintain an action to recover thereon what the invention was really worth, in the absence of any express contract in reference to the amount to be paid therefor.[2] The patent jurisdiction of this court is essentially that of the state courts, amplified by jurisdiction of cases of implied contract.[3]

Jurisdiction in Case of Claims Referred to it by Congress.

§ 386. The act provides for the jurisdiction of the Court of Claims of all claims referred to it by either house of Congress. This has been held to embrace the case of a claim referred to it by a resolution of Congress; and in such a case it is further held that the court is subject to all the restrictions prescribed by the resolution.[4]

Provision relating to Set-offs, Counter-Claims, etc.

§ 387. Whenever the court may entertain jurisdiction of an action against the United States for a recovery under the provisions of the first subdivision of the section under consideration, the second subdivision provides that the court may also take cognizance of all set-offs, counter-claims, claims for damages or other demands on the part of the United States against the person making the claim against them. It is not necessary that the set-off or demand against the claimant be liquidated; the statute is broad enough to cover all claims against him or those whom he represents; and the court may hear and determine demands of the government of every description against the claimant, and set off the amount found due on such demands and claims of

[1] United States *v.* Burnes, 12 Wall. 246; s. c., 4 Ct. Cl. 113.

[2] McKeever *v.* United States, 14 Ct. Cl. 396; U. S. *v.* Palmer, 128 U. S. 262.

[3] Gill *v.* U. S., 25 Ct. Cl. 415.

[4] Atocha *v.* United States, 6 Ct. Cl. 69; s. c., 17 Wall. 439; De Groot *v.* United States, 5 Wall. 419; Roberts *v.* United States, 6 Ct. Cl. 84; s. c., 92 U. S. 41; Tillson *v.* United States, 11 Ct. Cl. 758; s. c. 100 U. S. 43; Harvey *v.* United States, 12 Ct. Cl. 141; Same *v.* Same, 13 *id.* 322.

the government upon the hearing and determination of the cause.[1] Where the United States had recovered a judgment against M., and took an assignment of a judgment of the latter against B. in satisfaction of the former, it was held that they might set off the latter judgment in a suit brought by B. in the Court of Claims to recover an award made by Congress in his favor, although he had assigned the award to another, if the set-off was acquired before notice of the assignment.[2]

And the same doctrine applies in case of claim for an internal revenue tax.[3] And if an action is brought on a judgment rendered against the United States for property, the latter may set off the amount of the taxes due them on the property for which the judgment was rendered.[4] But if the United States fail to claim an off-set or demand of any kind which they might have set up on a claim made before the court, and judgment is entered in favor of the claimant for the value of property, the Secretary of the Treasury of the United States cannot afterwards deduct from the judgment the tax due on the property.[5]

A Set-off, Counter-claim, or other Defence must be Pleaded.

§ 388. In order for the government to avail itself of the second subdivision of the section under consideration relating to set-offs, counter-claims, etc., it is necessary that these matters of defence be specially pleaded. The judgments of this court, where no appeal is taken, are absolutely conclusive of the rights of the parties, unless a new trial is granted as provided by the statutes.[6]

[1] Allen *v.* United States, 17 Wall. 207. And see U. S. *v.* Saunders, 79 Fed. Rep. 407.

[2] Macauley *v.* United States, 11 Ct. Cl. 693.

[3] Roman *v.* United States, 11 Ct. Cl 761.

[4] Bonnafon *v.* United States, 14 Ct. Cl. 484.

[5] United States *v.* O'Grady, 22 Wall. 641; s. c., 8 Ct. Cl. 451. See also in special cases where other provisions are made: Jones *v.* United States, 4 Ct. Cl. 197; Roman *v.* United States, 11 *id.* 761; also McKnight *v.* United States, 98 U. S. 179.

[6] United States *v.* O'Grady, 13 Wall. 664. In an Indian Depredation case, which has been allowed by the Secretary of the Interior, the defendants may file a plea of set-off without electing to reopen the case: Labadie *v.* U. S. and Cheyenne Indians, 31 Ct. Cl. 436. As to new trials, see §§ 1087, 1088, of the Rev. Stat.

Jurisdiction of Claims of Disbursing Officers.

§ 389. The third subdivision of the section under consideration provides for the jurisdiction of the Court of Claims in case of a claim for relief from responsibility of any disbursing officer of the United States on account of capture or otherwise, while in the line of his duty, of government funds, vouchers, records or papers in his charge, etc. This more particularly embraces paymasters, quartermasters and commissaries of subsistence.

It has been held, under this provision, that the statute applied to cases of loss occurring before its adoption, as well as to those occurring subsequently thereto.[1] The officers mentioned in the statute can have no relief under this provision, nor the court have any jurisdiction of such a case, unless there is an existing liability at the time of the application. If the liability once existing has been discharged, there is no authority for the court to act.[2]

Under this provision a disbursing officer may obtain relief in this court from responsibility on account of a loss of government funds by robbery.[3] But he is not entitled to relief from responsibility for any loss occurring through the embezzlement of a clerk in his employment; nor for the loss of money, unless the money was at the time of the loss in his possession and under his control.[4]

Claims for the Proceeds of Captured or Abandoned Property.

§ 390. Subdivision 4 of the section giving jurisdiction to the Court of Claims confers power on that court to hear and determine all claims for the proceeds of captured or abandoned property, as provided by the acts of March 12, 1863, and July 2, 1864. And such subdivision excludes every other mode of redress against the United States or their agents, in the cases referred to. But the court has no jurisdiction of claims against the United States growing out of the destruction or appropriation

[1] Glenn *v.* United States, 4 Ct. Cl. 501.

[2] Hall *v.* United States, 9 Ct. Cl. 270.

[3] United States *v.* Clark, 96 U. S. 37; s. c., 11 Ct. Cl. 698.

[4] Hall *v.* United States, 9 Ct. Cl. 270.

of, or damage to, property by the army or navy, engaged in the suppression of the rebellion.[1]

Under this subdivision and the provisions of the acts referred to therein, it was held that no claim could be maintained for property which had been used, or was intended to be used, in carrying on war against the United States, and that the court could not take jurisdiction of a claim against the United States for property taken or destroyed by the army or navy of the United States while engaged in suppressing the rebellion. The only remedy in such a case must be through the executive or legislative departments of the government.[2]

Under the provisions of these statutes it has further been held that no action can be maintained to recover the proceeds of captured or abandoned property unless the property on which the claim is based was captured or seized, and sold, pursuant to the acts relating to captured and abandoned property, and the proceeds of the sale thereof were paid into the treasury of the United States, or went into the hands of some officer with the approval of the Treasurer, and the claimant was the owner of the property and entitled to the proceeds thereof. These facts should be clearly stated in the pleading, and must be established by sufficient proof on the trial to maintain the claim.[3] If the proceeds

[1] The captured or abandoned property act was a surrender by the United States of its right as a belligerent to appropriate property of a particular kind taken in the enemy's country and belonging to a loyal citizen: Briggs *v.* U. S., 143 U. S. 346. And see White *v.* U. S., 29 Ct. Cl. 264; Hodges *v.* U. S., 18 *id.* 700; Austin *v.* U. S., 25 *id.* 437.

[2] Slawson *v.* United States, 6 Ct. Cl. 370; s. c., 16 Wall. 310; United States *v.* Kimball, 13 Wall. 636; Gearing *v.* United States, 3 Ct. Cl. 165. Where property was seized by the Army or Navy in hostile territory during the Civil War, and it does not appear that it was used or turned over as captured property, it must be regarded as a case of damage or destruction of which the Court of Claims has no jurisdiction by § 3 of the Bowman Act: White *v.* U. S., 28 Ct. Cl. 57. And see Brown *v.* U. S., 29 *id.* 394. As to claims for stores and supplies, see Lobsiger *v.* U. S. 29 *id.* 430; Conard *v.* U. S. 25 *id.* 433.

[3] Spencer *v.* United States, 8 Ct. Cl. 288; s. c., 91 U. S. 577; United States, *v.* Ross, 92 *id.* 28; s. c. 10 Ct. Cl. 424; Sharp *v.* United States, 12 *id.* 638; Smith *v.* United States, 14 *id.* 189; United States *v.* Anderson, 9 Wall. 56; Bond *v.* United States, 2 Ct. Cl. 529. Though the property was captured on land and condemned as prize, the claimant may prosecute an action in this court for the proceeds: 99 U. S. 372; Cook *v.* United States, 9 Ct. Cl. 288; Winchester *v.* United States, 14 Ct. Cl. 13; s. c., 99 U. S. 372.

came into the hands of some military officer who used them in paying the expenses of ordinary military operations, or for other purposes authorized by law, and these disbursements have been allowed by the accounting officers of the treasury, this has been held equivalent to payment into the treasury.[1]

Presumptions in Relation to the Proceeds of Captured Property.

§ 391. Where the proceeds of the property sold were traced to the hands of an officer whose duty it was to transmit them to the Secretary of the Treasury, and a fund was shown to be in the treasury which might have been derived in whole or in part from the money thus transmitted, it was held that there was a presumption that the money was in the treasury.[2] But evidence merely that an officer of the government received the money derived from a sale, without any evidence that it was paid into the treasury or lawfully expended for the use of the government, affords no presumption of its proper disposition, and would be insufficient to base a claim for the proceeds. And proof that the property came into the possession of an employe of a treasury agent would raise no presumption that it came into the treasury.[3]

The Claimant must always have been a Loyal Citizen.

§ 392. Section 1072 of the Revised Statutes provides that the petition of the claimant should set forth "that the claimant, and where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the government of the United States, and whether a citizen or not, has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government, and that he believes the facts stated in the petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent or attorney." Under this statute it was held that if the

[1] Fleeker *v.* United States, 14 Ct. Cl. 252; Hudnal *v.* United States, 3 *id.* 291; Block *v.* United States, 7 *id.* 406; U. S. *v.* Winchester & P. R. Co., 163 U. S. 244.

[2] Jenkins *v.* United States, 8 Ct. Cl. 464; Crussell *v.* United States, 4 *id.* 553; S. C., 14 Wall. 1; United States *v.* Pugh, 99 U. S. 265; Henry *v.* United States, 6 Ct. Cl. 389; Silvey *v.* United States, 4 *id.* 490; S. C., 7 *id.* 178.

[3] See on the subject of the liability of officers: Lamar *v.* Browne, 92 U. S. 187; Lamar *v.* McCulloch, 115 *id.* 163.

property of a loyal and a disloyal person was intermingled and partly destroyed by fire, and the remaining property captured, under the provisions of the act relating to captured and abandoned property the disloyal person cannot waive his interest in the property thus captured, so as to enable the loyal party to recover the proceeds of the whole property.[1]

Claim for Property Destroyed, Appropriated or Injured by the Army or Navy.

§ 393. The subdivision under consideration excepts from the jurisdiction of the Court of Claims "any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, engaged in the suppression of the rebellion."[2]

The term "appropriation" used in the statute includes all taking and use of property, either real or personal, by the army or navy, engaged in suppressing the rebellion, not authorized by any contract with the government. The use may be temporary or permanent, but if the taking and use is not obtained by a lawful contract with the government, the taking and use is an "appropriation" within the meaning of the statute, and the Court of Claims can take no jurisdiction of a claim based thereon.[3] The same rule was held to apply even where an officer of the army took the property in an insurrectionary state, and promised to pay therefor and gave vouchers for it.[4] So a

[1] O'Keefe *v.* United States, 5 Ct. Cl. 674; s. c., 11 Wall. 178. But see Mezeix *v.* United States, 6 Ct. Cl. 232, where a loyal citizen was allowed to recover money taken from him, on account of disloyalty, by a military officer. If the property was captured before July 17, 1862, no action can be maintained: Moore *v.* United States, 10 *id.* 375. If the property was sold after July 17, 1862, and before March 12, 1863, and the proceeds paid into the treasury, an action may be maintained therefor: United States *v.* Pugh, 99 U. S. 265. When loyalty is jurisdictional, the court cannot look beyond the petition to ascertain the person whose loyalty must be established: Kirtley *v.* U. S., 27 Ct. Cl. 348. See also Haym *v.* U. S., 26 *id.* 167.

[2] Rev. Stat. § 1059, sub. 4; Corbett *v.* United States, 1 Ct. Cl. 139; Waters *v.* United States, 4 *id.* 389.

[3] Filor *v.* United States, 9 Wall. 45. See also Bishop *v.* United States, 4 Ct. Cl. 448; Pugh *v.* United States, 13 Wall. 633; s. c., 5 Ct. Cl. 113; Smith *v.* United States, 14 Ct. Cl. 189; Raines *v.* United States, 11 *id.* 648.

[4] Patterson *v.* United States, 6 Ct. Cl. 60.

claim arising from the impressment of a vessel by a military officer engaged in suppressing the rebellion cannot be prosecuted in the Court of Claims.[1]

But if an army officer took possession of premises under a valid contract, then the owner can maintain an action on the contract; and if damages are sustained by alterations made in the premises thus taken, the owner may have a remedy therefor in this court.[2] And where a vessel was chartered to the United States by the owner, and a military officer sunk her for military purposes, it was held that this court had jurisdiction of a claim based thereon for the value of the vessel.[3] But where an officer made a contract with the owner for the use or purchase of property during the rebellion, and for military purposes, but he had no authority so to do, it was held that the owner could not maintain an action therefor in this court.[4] Where the claimant's money was taken by the army, and thus came into the possession of the United States, it was held that this was not an appropriation by the army, and that an action therefor in this court should be sustained.[5]

Private Claims in Congress must be Transmitted to the Court of Claims.

§ 394. As one of the objects to be obtained by the constitution of the Court of Claims was to relieve Congress of the importunities of claimants against the government, and of the labor and vexation necessarily connected with the numerous petitions for relief of those who had private claims against the government, it was wisely provided that "all petitions and bills praying or providing for the satisfaction of private claims against the government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, shall, unless otherwise ordered by the house in which they are

[1] United States *v.* Kimbal, 13 Wall. 636; s. c., 5 Ct. Cl. 252.

[2] Provine *v.* United States, 5 Ct. Cl. 455; United States *v.* Russell, 13 Wall. 623; s. c., 5 Ct. Cl. 121.

[3] Bogert *v.* United States, 2 Ct. Cl. 159; Same *v.* Same, 3 *id.* 18. See also Waters *v.* U. S., 4 *id.* 389.

[4] Slawson *v.* United States, 4 Ct. Cl. 87; Same *v.* Same, 6 *id.* 370; s. c., 16 Wall. 310; Lindsley *v.* United States, 4 Ct. Cl. 359; Filor *v.* United States, 9 Wall. 45.

[5] Pennsylvania Co. *v.* United States, 7 Ct. Cl. 401.

introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents, to the Court of Claims."[1]

This provision is most salutary, as it removes from the legislative department and the arena of politics matters that properly belong to the judiciary department of the government, where justice is more likely to be administered both to the claimant and the government.

In Case of Judgments for Set-off or Counter-claim; How Enforced.

§ 395. We have noticed that the statute conferring jurisdiction on this court provides also that the court shall have jurisdiction of "all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government of the United States against any person making claim against the government in said court." It was wisely provided, further, that the court should hear and determine the claim against the government and the claim for the government, and render such judgment for either party as may be just. In the former case, if no appeal is taken provision is made for the satisfaction of the judgment by the Secretary of the Treasury, as we shall hereafter notice;[2] but in the latter case it is provided that the transcript of such judgment may be filed in the clerk's office of any district or circuit court; that it shall be entered upon the records thereof, and thereby become a judgment of such court, and may be enforced as other judgments of such court. The statute provides:

"Upon the trial of any cause in which set-off, counter-claim, claim for damages or other demand is set up on the part of the government against any person making claim against the government in said court, the court shall hear and determine such claim or demand both for and against the government and claimant;

[1] Rev. Stat. § 1060.

[2] Rev. Stat. § 1089. Where there is no definite evidence as to the amount of a counter-claim, if it appears to be in excess of the claim it may be used to defeat it, but judgment will not in such a case be entered against the claimant: Shrewsbury *v.* United States, 13 Ct. Cl. 183. As to matters proper to be set off, see Allen *v.* U. S., 17 Wall. 207; U. S. *v.* Burchard, 125 U. S. 176. See also Miller *v.* U. S., 19 Ct. Cl. 338; McElrath *v.* U. S., 12 *id.* 312; 102 U. S. 426.

and if upon the whole case it finds that the claimant is indebted to the government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal as in other cases provided by law. Any transcript of such judgment, filed in the clerk's office of any district or circuit court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such courts are enforced."[1]

The provision therein contained, providing for the filing of a transcript in the office of the clerk of any district or circuit court, and thereby making it a judgment of such court, is one for the benefit of the government only. The constitution of this court was for the benefit of claimants and a matter of grace on the part of the government, and the mode of satisfaction pointed out by the statute in case the claimant recovers judgment is the only mode of satisfaction which the claimant has.

No Jury Trials in the Court of Claims.

§ 396. The great spirit of liberality on the part of the government which led to the constitution of the Court of Claims, with jurisdiction to hear and determine certain claims against the government, did not extend to the giving of a right of trial by jury in such cases. The issues of law as well as of fact must be tried by the court, and the provisions of the statute, although not providing for the trial by jury, have been held to be constitutional.[2]

Decrees in Favor of Paymasters and other Accounting Officers.

§ 397. We have noticed the jurisdiction of this court in case of claims of paymasters and other accounting officers of the government on account of losses of government funds, etc., by capture or otherwise while in the line of their duty, and for which they are held responsible.[3] In case such a claim is established in this court another section provides how the decree must be satisfied. It provides as follows: "Whenever the Court of Claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence or other disbursing officer, in cases here-

[1] See Rev. Stat. § 1061.
[2] McElrath *v.* U. S., 12 Ct. Cl. 312; 102 U. S. 426.
[3] *Ibid.*

inbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the treasury shall allow to such officer the amount so decreed, as a credit in the settlement of his accounts."[1]

The right to recover in such a case will depend upon the officer's freedom from fault in connection with the loss. The facts of the particular case must be considered in the light of surrounding circumstances. What acts would be prudent and proper under the circumstances and necessities of a case might in other cases, owing to other facts and surrounding circumstances, be imprudent and negligent; and what would excuse a party for acts or conduct at one time and place may not do so under another state of facts. Great care and caution may be required at one time when it may not be required at others.

Negligence is the want of the ordinary care which a prudent man would exercise under the circumstances, and always involves the consideration of all the circumstances of the particular case. But ordinary care in one case may be gross negligence in another.[2] It was held, where a disbursing officer put money in a safe at his quarters, and a robber entered during his temporary absence and broke open the safe and took the money, that he was entitled to relief.[3]

So if money deposited by him in a safe is captured by the enemy he is entitled to relief in the Court of Claims.[4] And if he leaves his safe or money-box in a fort, as other disbursing officers have been accustomed to, and it is stolen, he is entitled to an allowance therefor.[5] So if he puts his desk containing government money and vouchers on board a transportation train, and it is captured by the enemy, he is entitled to credit for the money

[1] Rev. Stat. § 1062.

[2] Glenn *v.* United States, 4 Ct. Cl. 501; Malone *v.* United States, 5 *id.* 486.

[3] United States *v.* Clark, 96 U. S. 37; s. c., 11 Ct. Cl. 698. So where a disbursing officer under like circumstances left money in his safe which was stolen by his clerk, who had a key to the safe, he was held to be entitled to an allowance therefor: Howell *v.* United States, 7 Ct. Cl. 512.

[4] Christian *v.* United States, 7 Ct. Cl. 431. Or if captured by a raiding party: Prime *v.* United States, 3 *id.* 209.

[5] Glenn *v.* United States, 4 Ct. Cl. 501.

and vouchers.[1] But where a paymaster sent a package of $2,658 by an orderly detailed for service at his office, to a treasury depository in Boston, to be deposited there, and it was stolen by the orderly, but the loss was not discovered for several days thereafter, in a suit in the Court of Claims by the administrator of the deceased paymaster asking for relief from responsibility on account of the loss, it was held that the paymaster was at fault and negligent in entrusting so large a sum of money with the orderly, instead of depositing it himself or sending it by his clerk, and therefore that although the orderly had been prosecuted and convicted of the theft, and efforts to secure the stolen money had proved unavailing, the petitioner was not entitled to the relief he prayed.[2]

When the Head of an Executive Department May Cause Claims to be Transmitted to the Court of Claims.

§ 398. The statute provides: "Whenever any claim is made against any executive department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases or furnish a precedent for the future action of any executive department in the adjustment of a class of cases without regard to the amount involved in the particular case, or where any authority, privilege or exemption is claimed or denied under the Constitution of the United States, the head of such department may cause such claim, with all the vouchers, papers, proofs and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any auditor or comptroller of the treasury, direct any account, matter or claim of the character, amount or class described in this section to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to said court for trial and adjudication; *provided*, that no case shall be referred by any

[1] Murphy *v.* United States, 3 Ct. Cl. 212. So, if it is lost while carrying it in the breast-pocket of his coat in the way such officers generally carry money: Whittlesey *v.* United States, 5 *id.* 452.

[2] Holman *v.* United States, 11 Ct. Cl. 642 But see Clark's Case, *Ibid.* 698; s. c., 96 U. S. 37; Hall's Case, 9 Ct. Cl. 270.

head of a department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant."[1]

The words "whenever any claim is made against any executive department" imply that the claim must be pending there. It is only by virtue of such pendency that an executive department has power to refer it to the Court of Claims for adjudication. In cases so referred jurisdiction is acquired, if at all, by virtue of the reference and not by the filing of the petition.[2] But when an executive department refers a claim which it might have settled, a demand for unliquidated damages is within the jurisdiction of the Court of Claims, as if presented by voluntary petition, though the department may have had no authority to settle it.[3]

The claim must be one that has not already been finally disposed of. Where a portion of an account is rejected and a balance certified for the remainder, and both the accounting officers and the claimant treat the ruling as final, the claim for the unpaid balance cannot be transmitted to the Court of Claims.[4]

Although claims may be presented to any executive department of the government, as where they grow out of contracts with such department, still the Court of Claims cannot make a rule requiring such claims to be presented to such department before suing on them in that court.[5] A claim may be referred to the Court of Claims at any time before the payment thereof, and even after it has been previously referred to the accounting officers and allowed by the auditor and comptroller.[6] And if a claim for rent is made to an executive department, it may be referred to this court; and a claim may be referred although it involves a controversy between several claimants.[7]

But where the Secretary of War transmitted a claim to the Court of Claims, and the statement showed that the government

[1] Rev. Stat. § 1063.

[2] Armstrong *v.* U. S., 29 Ct. Cl. 148.

[3] Myerle *v.* U. S., 31 Ct. Cl. 105.

[4] Cotton *v.* U. S., 29 Ct. Cl. 207.

[5] Clyde *v.* United States, 13 Wall. 38; s. c., 5 Ct. Cl. 134. And see U. S. *v.* Knox, 128 U. S. 230; U. S. *v.* Fitch, 37 U. S. App. 103.

[6] Delaware Steamboat *v.* United States, 5 Ct. Cl. 55; Winnissimmet Co. *v* United States, 12 *id.* 319.

[7] Bright *v.* United States, 6 Ct. Cl. 118.

occupied certain premises and that certain rent was due therefor, but that two parties claimed the same, and only one of the parties appeared in the court and prosecuted his claim, the government making no defence, it was held that the party appearing could take no default, as it was necessary for him to show a *prima facie* right to recover, although it was not necessary to negative the conflicting claim of the adverse party.[1]

Procedure in Cases Transmitted by Departments.

§ 399. In all cases where claims are transmitted by the head of any department or upon the certificate of any auditor or comptroller, according to the provisions of the section last referred to, they must be proceeded in as in other cases pending in the Court of Claims, and are in all cases subject to the same rules and regulations.[2] The claimant should in such cases file his petition in this court, setting forth the facts on which he bases his claim, and the court, as in other cases, will decide the controversy both upon the law and the facts. If there are contesting claimants and one fails to appear in this court, a citation may issue for him to appear; but if he does not appear, and the government does not controvert the claim, still the claimant must establish his claim by legal proof.[3] But the claimant and the head of a department may agree upon a statement of facts, and submit only a question of law to this court.[4]

The amount of any final judgment or decree rendered in any

[1] Bright's Case, 8 Ct. Cl. 326.

[2] Rev. Stat. § 1064. In every case transmitted under the Bowman Act, a final judgment or decree may be rendered when it appears to the court that the case is one of which it might have taken jurisdiction at the voluntary suit of the claimant for purposes of final adjudication: U. S. *v.* New York, 160 U. S. 598. See this case for the general subject of transmission of cases by departments under Rev. Stat. § 1063 and the Bowman and Tucker Acts. See also Wilson *v.* U. S., 25 Ct. Cl 339; Farrar *v.* U. S , 26 *id.* 151; Stovall *v.* U. S., *Ibid.* 226.

[3] Bright *v.* United States, 6 Ct. Cl. 118; Same *v.* Same, 8 *id.* 326. The allowance of a claim by an accounting officer will not make out a *prima facie* case in favor of the petitioner in the Court of Claims: McKnight *v.* United States, 13 *id.* 292; s. c., 98 U. S. 179.

[4] Amoskeag *v.* United States, 6 Ct. Cl. 99; Broulatour *v.* United States, 7 Ct. Cl. 555. The Secretary of the Treasury, after determining every fact concerning an informer's claim, may remit the question of law involved for the decision of the Court of Claims: Horton *v.* U. S., 31 *id.* 148.

case transmitted to this court from the head of any department must be paid out of any specific appropriations applicable to the case, if any such there be; and if no such appropriation exists, then the judgment or decree must be paid in the same manner as other judgments of the court.[1]

Claims Pending in other Courts cannot be Prosecuted in the Court of Claims.

§ 400. The statute prohibits any person from filing or prosecuting in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act mediately or immediately under the authority of the United States.[2]

Aliens may Prosecute Claims in Certain Cases.

§ 401. An alien who is a citizen or subject of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts has the privilege of prosecuting claims against the United States in the Court of Claims, if such court by reason of its subject-matter and character may take jurisdiction.[3] The right to prosecute in such cases depends upon the reciprocal rights of our citizens in the courts of the government to which the alien owes allegiance; but such alien can only prosecute such claims as a citizen could prosecute. This right of aliens will be accorded even though the foreign government may reserve the right to deny a remedy to our citizens in its courts against it, in certain sporadic cases.[4]

The following mentioned governments accord to citizens of the United States the right to prosecute claims in their courts against their governments, as fully and substantially as they are allowed to prosecute against the government of the United

[1] Rev. Stat. § 1065.

[2] Rev. Stat. § 1067. Where a party takes a witness into the jurisdiction of a state court, he cannot ask for additional process in the Court of Claims until the jurisdiction he has invoked is exhausted: Elting *v.* U. S., 27 Ct. Cl. 158.

[3] Rev. Stat. § 1068.

[4] United States *v.* O'Keefe, 11 Wall. 178; Carlisle *v.* United States, 16 *id.* 147. See The Sapphire, 11 *id.* 164, and cases cited.

States: to wit, Great Britain, France, Belgium, Italy, Prussia, Spain and Switzerland. Hence an alien owing allegiance to either of these governments may maintain an action in the Court of Claims, in any of those cases where the court would have jurisdiction if a citizen was the claimant.[1]

The section under consideration was adopted July 27, 1867, previous to which time there was no limitation of the jurisdiction of the court on the ground of alienage. This section then was one of limitation and restriction. Therefore where a suit was brought by an alien, after the organization of the court and the conferring of jurisdiction upon it, but before the adoption of the section now under consideration, the jurisdiction of the court could not be affected by the fact of alienage, or the rights and privileges of American citizens in the courts of the government to which the alien owed allegiance.[2]

Limitations of Actions in the Court of Claims.

§ 402. The statute limits the time of presenting claims to this court for adjudication as follows: "Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting fourth a statement thereof is filed in the court, or transmitted to it by the secretary of the Senate or clerk of the House of Representatives as provided by law, within six years after the claim first accrues; *provided*, that the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued entitled to the claim, shall not be barred if the petition be filed in the court or transmitted as aforesaid, within three years after the disability

[1] United States *v.* O'Keefe, 11 Wall. 178; s. c., 5 Ct. Cl. 674; Carlisle *v.* United States, 16 Wall. 147; Rothschilds *v.* United States, 6 Ct. Cl. 204; Dauphin *v.* United States, *Ibid.* 221; De Give *v.* United States, 7 *id.* 517; Fichera *v.* United States, 9 *id.* 254; Brown *v.* United States, 5 *id.* 571; Noling *v.* United States, 6 *id.* 269; Lobsiger *v.* United States, 5 *id.* 687.

[2] Schafer *v.* United States, 4 Ct. Cl. 529; Wagner *v.* United States, 5 *id.* 637; Bulwinkle *v.* United States, 4 *id.* 395; Mentz *v.* United States, *Ibid.* 471. The right to sue is given under this section to an alien, although a citizen of the United States may be required to give security for costs: Brown *v.* United States, 5 *id.* 571.

has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of such disabilities operate cumulatively."[1]

The provisions of this section have been held not to apply to suits pending at the time of its adoption,[2] nor to claims for the proceeds of captured or abandoned property, as in the latter case the claim was barred under the provisions of the statute relating thereto, unless the petition therefor was filed within two years after the 20th day of August, 1868.[3]

It is not essential that the limitation should be pleaded as a defence, but the court is bound to take notice of the fact that the period limited by law has expired, if it appears on the face of the petition or by the evidence in the case.[4] An act which refers a claim to the Court of Claims and relieves it from the operation of the statute of limitations, nevertheless leaves it subject to all presumptions of fact.[5]

[1] Rev. Stat. § 1069; McKnight *v.* United States, 68 U. S. 179; s. c., 13 Ct. Cl. 292; Cross *v.* United States, 4 Ct. Cl. 271; Bell *v.* United States, 9 *id.* 302; s. c., 20 Wall. 179; Campbell *v.* United States, 13 Ct. Cl. 108. The Tucker Act provides that "no suit against the government of the United States shall be allowed under this act, unless the same shall have been brought within six years after the right accrued for which the claim is made." The court has no power under this act to render judgment upon the merits where a claim is barred by the statute: Waddell *v.* U. S., 25 Ct. Cl. 323. A preliminary petition filed under Rule 8 stops the running of the statute, if it designates the claims with sufficient definiteness to lay a foundation for the action: Hillborn *v.* U. S., 27 *id.* 547.

[2] Parlin *v.* United States, 1 Ct. Cl. 174. The statute does not bar claims referred to the court by the head of an executive department, if they were presented at the proper department within six years: U. S. Lippitt, 100 U. S. 663; Alexandria, L. & H. R. Co. *v.* U. S., 26 Ct. Cl. 327. And see U. S. *v.* Smith, 105 U. S. 620; Finn *v.* U. S., 123 *id.* 227; U. S. *v.* Louisiana, 127 *id.* 182. Cases referred to by either House of Congress are subject to the bar of the statute: Ford *v.* U. S., 116 *id.* 213.

[3] United States *v.* Anderson, 9 Wall. 56; s. c., 4 Ct. Cl. 467; Grossmeyer *v.* United States, 4 Ct. Cl. 1; Hamner *v.* United States, 13 *id.* 7; Haycroft *v.* United States, 22 Wall. 81; s. c., 10 Ct. Cl. 95; Schafer *v.* United States, 4 Ct. Cl. 529; Persons *v.* United States, 10 *id.* 502. A petition for the proceeds of captured or abandoned property could not be entertained before the suppression of the rebellion: Tibbets *v.* United States, 1 Ct. Cl. 196; s. c., 2 Ct. Cl. 582.

[4] Kendal *v.* United States, 14 Ct. Cl. 122.

[5] Martin *v.* U. S., 28 Ct. Cl. 137.

When the Time Commences to Run.

§ 403. Under the provisions of this statute of limitations, where the claim was for the surplus of the proceeds of land sold for a direct tax, it was held that the cause of action accrued upon the refusal of the Secretary of the Treasury to pay the money.[1] But where the claim is for money received by the United States and paid into the treasury, the action must be brought within six years after it is thus paid in.[2] And, in general, where an action is founded upon a statutory right, the statute of limitations begins to run from the time when the appropriation for the payment of the claim first becomes available.[3] If the claim arises on a contract for the sale of goods, the suit must be brought within six years from the stipulated time of payment.[4] If the claimant merely seeks to have a sum of money, lost by him as a disbursing officer, allowed to him on the settlement of his accounts with the government, the statute does not begin to run until the accounting officers of the treasury refuse to allow the sum lost as a valid credit in the settlement of the accounts.[5]

If a collector of customs pays money into the treasury, in compliance with a demand of the Treasury Department, which he is entitled to retain as a compensation for his services, the statute begins to run from the time of the payment.[6] If the claimant dies before the claim becomes due, the statute will not begin to

[1] Taylor *v.* United States, 14 Ct. Cl. 339.

[2] Clark *v.* United States, 99 U. S. 493. Where a claim against the United States, whose prosecution in the Court of Claims was barred by the statute, was presented to the Treasury for adjustment and payment, and by the Secretary transmitted to the Court of Claims under Rev. Stat. § 1063, it was held to be barred by the statute: De Arnaud *v.* U. S., 151 U. S. 483.

[3] Bernard *v.* U. S., 26 Ct. Cl. 312.

[4] Bartelle *v.* United States, 7 Ct. Cl. 297.

[5] United States *v.* Clark, 96 U. S. 37; S. C., 11 Ct. Cl. 698. If claims are presented for settlement within six years, to the proper head of an executive department, they are not barred if more than six years transpire before they are referred by such department to the Court of Claims: United States *v.* Lippitt, 100 U. S. 663.

[6] Lawson *v.* United States, 14 Ct. Cl. 332. See also Bachelor *v.* United States, 8 *id.* 235; Ellsworth *v.* United States, 14 *id.* 382. No exception can be engrafted on the statute, however reasonable and just it may appear: Cross *v.* United States, 4 *id.* 271; and payment of part of the debt will not take the case out of the operation of the statute: United States *v.* Wilder, 13 Wall. 254.

run until an administrator is appointed.[1] But if the statute begins to run in the lifetime of the claimant, its operation will not be suspended by his death.[2] If the claim is properly made within the time prescribed, the petition may be amended, although more than six years have elapsed since the claim accrued; and this is especially the case where the amendment only increases the *ad damnum* laid in the original petition.[3]

The Court of Claims may establish Rules for its Government and Practice.

§ 404. The Court of Claims has authority to establish rules for its government and for the regulation of practice therein, and it has authority to punish for contempt in the manner prescribed by the common law. It may appoint commissioners and exercise such powers as are necessary to carry into effect the powers given by law.[4] The court will appoint a special commissioner where there are complicated accounts or complicated facts to be passed upon, to whom they will be referred to state the accounts, and report his finding on the facts.[5] So, if the claimant does not in his petition set forth the items of his account, the court may refer the case to a special commissioner, to state an account at the expense of the claimant.[6] If there are several claimants seeking to recover the proceeds of a common fund held by the United States, the court may properly refer the case to a commissioner to marshal the assets and charge it with the proper losses, so that justice may be done.[7]

If a cause is referred to a special commissioner to state an account, notice should be given to the parties to appear before him for that purpose; and if either party is not satified with his statement of the account, or the finding of facts, he should except to the report.[8]

[1] Fulenweider *v.* United States, 9 Ct. Cl. 403.

[2] Sierra *v.* United States, 9 Ct. Cl. 224.

[3] Griffin *v.* United States, 13 Ct. Cl. 257; Devlin *v.* United States, 12 *id.* 266.

[4] Rev. Stat. § 1070.

[5] United States *v.* Raymond, 92 U. S. 651; Lawrence *v.* United States, 6 Ct. Cl. 79.

[6] Jones *v.* United States, 4 Ct. Cl. 197

[7] Persons *v.* United States, 10 Ct. Cl. 502; Crowell *v.* United States, 6 *id.* 23.

[8] Jones *v.* United States, 4 Ct. Cl. 197; Bright *v.* United States, 12 *id.* 646.

The judges and clerks of the court are authorized to administer oaths and affirmations, take acknowledgments of instruments in writing and give certificates of the same.[1]

The Petition; What it should Contain.

§ 405. The petition must in all cases set forth the claim and any action of Congress or by any of the departments thereon, if any action has been had. It should also set forth what persons are the owners of the claim or interested in it, and when and upon what consideration they became so interested therein. It should also state that no assignment or transfer of the claim, or any part thereof or interest therein, has been made, except as stated in the petition, and that the claimant is justly entitled to the amount therein claimed from the United States after deducting all just credits and off-sets. And it was formerly required that it should further state that claimant, and where the claim has been assigned, that the original and prior owner thereof, if a citizen, has at all times borne true allegiance to the government of the United States, and, whether a citizen or not, has not voluntarily aided, abetted or given encouragement to rebellion against the government of the United States, and that he believes the facts as stated in the petition to be true. But since the decision relating to the effect of the proclamation of amnesty and general pardon, the court does not require an allegation of loyalty in the petition.[2] The petition must be verified by the plaintiff or his agent or attorney.[3]

The petition should set forth the facts on which the claimant bases his claim with precision and without ambiguity; and if there is uncertainty in the language used, it will be construed most strongly against the claimant.[4] It need not set forth the evidence which is to be used to prove the facts, but it should state the facts upon which the claim rests.[5] If the petition is to recover

[1] Rev. Stat. § 1071.

[2] United States *v.* Insurance Companies, 22 Wall. 99; Carlisle *v.* United States, 16 Wall. 147.

[3] Rev. Stat. § 1072.

[4] Merchants' Exchange Co. *v.* United States, 1 Ct. Cl. 332; Guttman *v.* United States, 6 *id.* 111.

[5] Brown *v.* United States, 1 Ct. Cl. 377; Baird *v.* United States, 5 *id.* 348; s. c., 8 *id.* 13; Monk *v.* United States, 12 *id.* 293; Morgan *v.* United States, 14 *id.* 442; Noble *v.* United States, Dev. C. C. 134.

money illegally exacted by some agent or officer of the government as duties, it should aver that a protest was made as required by law;[1] and if the claim is founded upon an act of Congress, the act should be referred to in the petition. If the petition on its face shows that the claim first accrued more than six years before it was filed, it should set forth at least one of the legal disabilities mentioned in the statute as a bar to the operation of the statute, and further show that it was filed within three years after such disability was removed.[2]

The petition should further state the amount for which the claimant demands judgment or the relief which he claims. And as we have observed, it was formerly required that the plaintiff, whether a citizen or an alien, should state that he has not in any way voluntarily aided, abetted or given encouragement to rebellion against the government of the United States;[3] or if so, that he has been legally and fully pardoned for such participation in the rebellion by the President of the United States.[4]

Parties.

§ 406. A corporation may be a claimant; and where a corporation was created in an insurrectionary state during the rebellion, with no purpose hostile to the United States, nor in conflict with the Constitution, it was held that such corporation might prosecute an action in the Court of Claims under the "captured and abandoned property act."[5] So a *feme covert* may prosecute a claim in her own name where her husband refuses to join her, if the laws of the state where she has her domicile allow her to sue under such circumstances.[6] So a principal may sue on a contract made by an agent in his own name and with-

[1] Schlesinger *v.* United States, 1 Ct. Cl. 16; Nicoll *v.* United States, *Ibid.* 70.

[2] Kendal *v.* United States, 14 Ct. Cl. 122; Same *v.* Same, *Ibid.* 374. See Buck *v.* U. S., 25 *id.* 120.

[3] Patterson *v.* United States, 6 Ct. Cl. 60; Hill *v.* United States, 8 *id.* 470.

[4] Pargond *v.* United States, 13 Wall. 156; s. c., 4 Ct. Cl. 337.

[5] United States *v.* Insurance Companies, 22 Wall. 99. And a corporation may be a claimant under the Indian Depredations act, 1891: U. S. *v.* Northwestern Expr., S. & T. Co., 17 Supr. Ct. Repr. 206.

[6] Stanton *v.* United States, 4 Ct. Cl. 456. See also Meriwether *v.* United States, 13 *id.* 259.

out disclosing his principal.[1] And if a guardian is appointed in one state and an executrix in another, the former may file a petition for his ward if he is appointed in the state where the ward has his domicile.[2]

If there are two parties interested in a contract on which the claim against the government is based, one may prosecute the claim although the other is disqualified by disloyalty.[3] But in such a case the claimant must show the extent of his interest, and can only recover to that extent.[4] And where the claimants were partners, it was held that the disloyality of one would defeat the action, if there was no means of determining the individual interest of each in the claim made.[5] As a general rule all persons who have a joint interest in the claim should join in the petition; but if several parties have separate interests in the same, they cannot properly join in one petition. Thus, where two separate firms have separate claims they cannot unite and file a petition therefor.[6] Under the Bowman act a claim may be proved by one having a substantial interest as a widow or child, though he or she be not the legal representative of the original claimant.[7]

Choses in Action.

§ 407. It seems that the general principle of the common law in reference to assignments of choses in action are followed in this court. If the claim assigned is a chose in action, suit may be prosecuted in the name of the assignor for the benefit of the assignee, if the assignor is connected with the case, which may be shown by his verification of the petition or by proof of the

[1] Ramsdell *v.* United States, 2 Ct. Cl. 508. But since Rev. Stat. § 3744, requiring contracts to be in writing, the doctrine that an action may be brought by the principal, though the contract was made in the name of the agent, is not applicable to contracts made with the War, Navy and Interior Departments: Chapter of Calvary Cathedral *v.* U. S., 29 *id* 269.

[2] Stanton *v.* United States, 4 Ct. Cl. 456.

[3] United States *v.* Burns, 12 Wall. 246; s. c., 4 Ct. Cl. 113; Fain *v.* United States, 4 Ct. Cl. 237; Mildrim *v.* United States, 7 *id.* 595.

[4] Headman *v.* United States, 5 Ct. Cl. 640.

[5] Schreiner *v.* United States, 6 Ct. Cl. 359.

[6] Wilson *v.* United States. 1 Ct. Cl. 318; Parish *v.* United States, *Ibid.* 345.

[7] Cofer *v.* U. S., 30 Ct. Cl. 131.

transfer.[1] And if an assignment is made for the benefit of creditors, the assignee may prosecute the suit in the name of the assignor.[2] Claims for property seized by the army in the seceded states during the civil war do not pass in bankruptcy and may be prosecuted by the original claimant.[3]

Pleading, Practice and Procedure.

§ 408. The general rules of common law relating to pleading are required to be observed in the Court of Claims, although the proceedings will not be regulated by the exact rules of special pleading. The substance of matters will be regarded rather than forms and technicalities.[4] If a petition is not verified, a motion may be made to dismiss it;[5] and if the petition does not show a right to recover, or that the court has jurisdiction of the cause, this may be taken advantage of by demurrer. If the petition is satisfactory in these respects, the objection to the jurisdiction of the court may be taken by plea.[6] But a plea to the jurisdiction will not be allowed after a traverse, without leave of the court.[7] If the United States file a general traverse to a petition that is not verified, they thereby waive a want of verification;[8] and if they do not traverse an allegation of loyalty, it will be presumed to be true.[9] If a corporation is claimant, and it is averred in the petition that it was duly created a corporation, its incorporation need not be proved, unless this allegation is specially traversed.[10]

[1] Jackson *v.* United States, 1 Ct. Cl. 260; Crowell *v.* Jackson, 6 *id.* 23; Silverhill *v.* United States, 5 *id.* 610.

[2] Morgan *v.* United States, 14 Ct. Cl. 319. A party possessing a full title to a vessel in law is the proper party to maintain a suit under the French Spoliations Act, 1895, though under certain possible conditions creditors, as beneficiaries under a deed of trust, may have a claim upon the recovery: Van Wagenen *v.* U. S., 31 *id.* 262.

[3] Campbell *v.* U. S., 28 Ct. Cl. 512.

[4] Pierce *v.* United States, 1 Ct. Cl. 195; Benton *v.* United States, 5 *id.* 692; Baird *v.* United States, 8 *id.* 13. So the common-law rules of evidence prevail unless a different rule is prescribed by statute. The Bowman Act has not changed this rule in its application to Congressional cases: Allen *v.* U. S., 28 *id.* 141.

[5] Griffin *v.* United States, 13 Ct. Cl. 257.

[6] Pennsylvania Co. *v.* United States, 7 Ct. Cl. 401; Graham *v.* United States, 1 *id.* 183; Pierce *v.* United States, *id.* 195.

[7] *Ibid.*

[8] Griffin *v.* United States, 13 Ct. Cl. 257.

[9] Hill *v.* United States, 8 Ct. Cl. 470.

[10] Hebrew Congregation *v.* United States, 6 Ct. Cl. 241; United States *v.* Insurance Companies, 22 Wall. 99; South Pac. Co. *v.* U. S., 28 Ct. Cl. 77.

In an Indian depredation case the general traverse puts in issue every material allegation of the petition and casts upon the claimant the burden of proof. If the Attorney-General fails to file his plea, the claimant cannot have judgment by default, but must prove his case.[1] The jurisdictional facts, citizenship and amity, are regarded as put in issue by the general traverse, but if either party ask a severance of issues, the jurisdictional issues must be first tried and determined. Such a request should be made in due time.[2] Where a plea is not filed by the defendants within the sixty days prescribed by section 4 of the act, the court may subsequently allow it to be done; the statutory provision is directory to the Attorney-General and not mandatory upon the court.[3]

The Petition may be Amended.

§ 409. Great liberality is extended by this court in allowing amendments. If a petition is defective in its averments it may be amended; but not without leave of the court.[4] Thus if a petition is not verified it may be amended in this respect.[5] So a petition may be so amended as to show that another party has an interest in the claim, or where there are joint owners of property on which the claim is based an amendment of the petition will be allowed to enable the claimants to sever in the prayer for relief, and to ask for separate judgments.[6] So an amendment will be allowed to sustain and protect the original cause of action, as by allowing an administrator to take the place of a guardian of the deceased, and the husband the place of the wife in certain cases.[7] So if two joined in a petition for a claim and only one is

[1] King *v.* U. S. & Kiowa Indians, 31 Ct. Cl. 304.

[2] Gamel *v.* U. S. & Comanche Indians, 31 Ct. Cl. 321.

[3] Labadie *v.* U. S. & Cheyenne Indians, 31 Ct. Cl. 436.

[4] Jones *v.* United States, 1 Ct. Cl. 383; Shaw *v.* United States, 9 *id.* 301; Griffin *v.* United States, 13 *id.* 257. An amendment is proper, as against the statute of limitation, when no new cause of action is introduced: Buck *v.* U. S., 25 *id.* 120.

[5] *Ibid.*; Cross *v.* United States, 14 Wall. 479; s. c., 5 Ct. Cl. 88.

[6] Mott *v.* United States, 3 Ct. Cl. 218. Where the party who institutes an action is not authorized to bring it, but possesses some legal relation with the proper party concerning the cause of action, the latter may be substituted as claimant: Davenport *v.* U. S. *et al.*, 31 *id.* 430.

[7] Bellocque *v.* United States, 8 Ct. Cl. 493.

entitled to recover, the petition may be amended by striking out the name of the disinterested party.[1]

Consolidation and Intervention.

§ 410. If the assignees of vouchers issued under the same contract bring suits separately in the name of the assignor, the suits may be consolidated.[2] So if the goods of several owners become commingled, the claims of the several claimants therefor may be consolidated, and they be permitted to litigate with each other.[3]

If one claims money in the court, which is also claimed by another, the former may file a petition of intervention in the case;[4] and if there are several claimants of the same fund in court, and they intervene or are united with the original claimant, the latter will be first required to make out a case only against the United States, after which the others will be permitted to establish their rights as against the original claimant.[5]

When a Cause will be Remanded for Further Proof.

§ 411. If there is omission to furnish certain proof which can be readily supplied, the cause will be remanded for further proof, even after a hearing.[6] And where it appears on a hearing of a cause that there are documents which have been introduced as evidence in the case that are not competent evidence, it may be remanded to give the parties an opportunity to furnish competent evidence or make some stipulation concerning the matter.[7] But a cause will not be remanded for further proof, so as to

[1] Molina *v.* United States, 6 Ct. Cl. 269. So, if husband and wife are joined as claimants, and he alone is entitled to the claim, her name may be stricken from the petition: Benton *v.* United States, 5 *id.* 692. So also, where a *feme covert* and husband sue and he dies, she may prosecute the suit alone, if the claim belongs to her: Rodden *v.* United States, 6 *id.* 308.

[2] Crowell *v.* United States, 6 Ct. Cl. 23.

[3] United States *v.* Raymond, 92 U. S. 651; Woodruff *v.* United States, 4 Ct. Cl. 486.

[4] Meziex *v.* United States, 6 Ct. Cl. 232; Turner *v.* United States, 2 *id.* 390.

[5] Woodruff *v.* United States, 4 Ct. Cl. 486; Boyd *v.* United States, 9 *id.* 419.

[6] Daniels *v.* United States, 5 Ct. Cl. 65; Crowell *v.* United States, 6 *id.* 23; Mahan *v.* United States, *Ibid.* 831; Fendall *v.* United States, 12 *id.* 305.

[7] Lender *v.* United States, 5 Ct. Cl. 544.

enable either party to furnish additional evidence to make his side of the case appear plainer, where there has been only a conflict of evidence.[1] When a cause is remanded for further proof either party may re-examine a witness whose testimony has already been taken, and either party may take further testimony; as every issue is open to controversy on the second trial.[2]

Burden of Proof of Loyalty; When the Petition will be Dismissed.

§ 412. The allegations of the petition, as to true allegiance and not voluntarily aiding and abetting or giving encouragement to the rebellion against the government, may be traversed by the government, and if on the trial such issues shall be decided against the claimant, his petition must be dismissed unless he is within the provisions of the proclamation of general pardon.[3] The claimant in all such cases, as we have stated, has until recently been required to prove affirmatively that the person or persons upon whose loyalty his claim depends did consistently adhere to the United States and give no aid or comfort to persons engaged in the rebellion; and the voluntary residence of any such person in any place where the rebel force or organization held sway was by statute made *prima facie* evidence that such person did give aid and comfort to said rebellion and to the persons engaged therein.[4]

Aid and Comfort to the Rebellion must have been Voluntarily Given.

§ 413. The statute last cited did essentially change the proof required by previous ones.[5] Any voluntary acts which tend to assist, countenance, abet or encourage the rebellion or persons engaged in the rebellion, done or committed by the claimant with the intention and for the purpose of aiding the rebellion or

[1] Crowell *v.* United States, 6 Ct. Cl. 23. See also Shrewsbury *v.* United States, 13 *id.* 183.

[2] Culleton *v.* United States, 5 Ct. Cl. 627; Gaither *v.* United States, 3 *id.* 191. See Giddings *v.* U. S., 29 *id.* 12.

[3] Rev. Stat. § 1073.

[4] Rev. Stat. § 1074; 15 U. S. Stat. 75. This section controls cases under the Bowman Act. The loyalty must have been continuous throughout the war: Watson *v.* U. S., 25 Ct. Cl. 116.

[5] United States *v.* Padelford, 9 Wall. 531; Grossmeyer *v.* United States, 4 Ct. Cl. 1.

of promoting its power and success, would defeat his claim.[1] But it is not sufficient to show a purpose to give aid and comfort: the aid and comfort must have been actually given.[2] And acts of affection or humanity rendered to persons engaged in the rebellion, or contributions and taxes paid where the rebel authority had sway, but extorted by a force and power that could compel submission, do not constitute aid and comfort to the enemy within the meaning of the statute.[3]

Where an administrator claimed property held by him as administrator, and which was taken from him as captured or abandoned, it was held that a right to recover the proceeds of the same would depend upon his loyalty and not upon that of the decedent or of the distributees.[4] If the claimant is a mere trustee, his right to recover for the benefit of the beneficiaries does not depend upon his loyalty, but that of the beneficiaries entitled to the claim.[5] Whether it is the loyalty of the guardian or of his ward that is a jurisdictional fact has never been determined.[6] Under the Bowman Act the loyalty of the person from whom the stores or supplies are taken is the only one to be considered; that of his next of kin is immaterial.[7]

The Effect of a Pardon and Amnesty; Burden of Proof.

§ 414. The proclamation of pardon and amnesty is a complete exemption of a claimant from disability growing out of giving "aid and comfort to the rebellion," if he took the oath of amnesty required by the terms of the President's proclamation. The pardon and oath blot out the offence, and on proof of these no proof will be required that he was loyal during the rebellion.[8]

[1] Bond *v.* United States, 2 Ct. Cl. 528; Bates *v.* United States, 4 *id.* 569; United States *v.* Padelford, 9 Wall. 531; Grossmeyer *v.* United States, 4 Ct. Cl. 1.

[2] Hill *v.* United States, 8 Ct. Cl. 470.

[3] Grossmeyer *v.* United States, 4 Ct. Cl. 1.

[4] Carroll *v.* United States, 13 Wall. 351; s. c., 5 Ct. Cl. 620; Carroll *v.* United States, 7 *id.* 589.

[5] Stoddart *v.* United States, 6 Ct. Cl. 340.

[6] Kirtley *v.* U. S., 27 Ct. Cl. 348.

[7] Lynch *v.* U. S., 31 Ct. Cl. 62.

[8] Carlisle *v.* United States, 16 Wall. 147; Armstrong *v.* United States, 13 Wall. 154; s. c., 5 Ct. Cl. 623; United States *v.* Padelford, 9 Wall. 53; s. c., 4 Ct. Cl. 316; United States *v.* Klein, 13 Wall. 128; s. c., 4 Ct. Cl 559; Hamilton *v.* United States, 7 Ct. Cl. 444; Backer *v.* United States, *Ibid.* 551.

But under a special statute requiring that loyalty should be proved, it was held to be the duty of the court to determine the actual loyalty of the decedent during the rebellion as contradistinguished from innocence in law produced by pardon and to dismiss the petition, having found that the claimant was not loyal.[1]

If a claimant resided during the rebellion where the rebel force held sway, and has not obtained a pardon, the burden of proof is upon him to show his loyalty to the government during the rebellion.[2]

In case of an alien, it is not essential for him to show that he during the rebellion adhered to the United States, but it will be enough to show that he observed a strictly neutral course through the war, and gave no aid or comfort to the rebellion.[3] Residence of an alien in a foreign country during the war of the rebellion raises a presumption of neutrality.[4] So it has been held that there is a presumption of loyalty in favor of a person who was a citizen and resident of a loyal state during such war;[5] and that very slight evidence suffices to establish the loyalty of a colored person residing within a rebellious state during the war.[5]

Acts of Aid and Comfort to the Rebellion.

§ 415. Where a person was voluntarily connected with the violation of the blockade laws; and where a person sold goods to an agent of the rebellious government who bought them to aid the rebellion; and where a person became surety on the official bond of an officer in the military service of the rebels; and where a person entered the military service of the rebellious states, which he could have avoided; these parties were respectively held to have given aid and comfort to the rebellion.[7]

[1] Austin *v.* U. S., 155 U. S. 417.

[2] United States *v.* Burns, 12 Wall. 246; s. c., 4 Ct. Cl., 113; Deerson *v.* United States, 5 Ct. Cl. 626; Deerson *v.* United States, 6 *id.* 227.

[3] Rothschild *v.* United States, 6 Ct. Cl. 204.

[4] Hill *v.* United States, 8 Ct. Cl. 470.

[5] Turner *v.* United States, 3 Ct. Cl. 400.

[6] Thomas *v.* United States, 3 Ct Cl. 52; Dereef *v.* United States, *Ibid.* 163.

[7] Bates *v* United States, 4 Ct. Cl. 569; Carlisle *v.* United States, 16 Wall. 147; United States *v.* Padelford, 9 *id.* 531; Kuper *v.* United States. 3 Ct. Cl. 74. But where a party became interested in an adventure to run the blockade, it was held that this was not giving aid and comfort to the rebellion, unless the adventure was put afloat: Hill *v.* United States, 8 Ct. Cl. 470.

The Court may Appoint Commissioners to take Testimony.

§ 416. There is conferred upon the Court of Claims power to appoint commissioners to take testimony to be used in the investigation of claims which come before it. The court also has the authority to prescribe the fees of such commissioners for the taking of testimony, and to issue commissions for the taking of testimony, whether at the instance of the claimant or of the United States.[1]

The testimony to be used in this court must be taken by deposition;[2] and *ex parte* affidavits cannot be used as evidence, although they are transmitted to the court, with the petition, by Congress.[3]

Application for a Commission, and Practice Thereon.

§ 417. Application for the issue of a commission to take testimony in a case may, as a general rule, be made at any time before trial, and when made, an order will always be entered by the clerk therefor, as of course.[4] But if the issue of a commission and the taking of testimony, and a return of the same, will require a postponement of the case, the court may determine whether it should issue and whether a trial should be postponed under all the circumstances of the case.[5]

Mode of taking Depositions.

§ 418. The depositions of witnesses should be written out in the usual way, with questions and answers thereto immediately following, under oath. They should be read over to and signed by each witness deposing, and must state that the witness testified in the presence of all the parties. And if an addition is made after the attorney of one of the parties has left, it will on motion

[1] Rev. Stat. § 1075.

[2] Hughes *v.* United States, 4 Ct. Cl. 64. Where a witness is found in the District of Columbia his testimony may be taken in court or before a commissioner; when at a distance, it must be taken by a commissioner: Elting *v.* U. S., 27 *id.* 158,—said to be the "first instance in the history of the court where proceedings have been instituted to punish a witness for refusing to testify."

[3] Clark *v.* United States, 1 Ct. Cl. 246; McKee *v.* United States, *Ibid.* 336; Wilde *v.* United States 7 *id.* 415.

[4] Mahan *v.* United States, 6 Ct. Cl. 331.

[5] Atocha *v.* United States, 6 Ct. Cl. 95.

be stricken out.[1] The commissioner should so connect the sheets together and seal them that they cannot be removed or tampered with, and both he and the witness should place their names on each sheet of paper.[2]

When a Witness may be Re-examined.

§ 419. Usually, when the right to examine a witness has been exercised it is exhausted, and no re-examination of the witness can be had unless by leave of the court, granted on a proper application made therefor. If a party neglects so to apply, and takes a second deposition of the same witness, the court will exercise its discretion as to admitting it in evidence on the trial, if it is objected to.[3]

Objections, How and When Taken.

§ 420. Objections to parol evidence of the contents of a written instrument should be taken at the examination, for secondary evidence is admissible if no objection thereto is made; and so objection to the form of the question, as that it is leading, must be then made, as even leading questions may be allowed, and especially if no objection is made. But objections which relate to the manner and form of taking or returning depositions may be taken at any time before a hearing of the case on its merits.[4]

The Court may call upon any of the Departments for Information; Evidence; Witnesses.

§ 421. This court has authority to call upon any of the departments for any information or papers it may deem necessary, and is entitled to the use of all recorded and printed reports made by the committee of each house of Congress when deemed necessary in the prosecution of its business. But the head of a depart-

[1] Martin *v.* United States, 3 Ct. Cl. 384; Shrewsbury *v.* United States, 9 *id.* 333.

[2] Martin *v.* United States, 3 Ct. Cl. 384.

[3] Mahan *v.* United States, 6 Ct. Cl. 331; Sevier *v.* United States, 7 *id.* 388, in which it was held, if leave was given to re-examine upon a particular point, the witness cannot be examined on other matters.

[4] Hughes *v.* United States, 4 Ct. Cl. 64. If the deposition is taken upon written interrogatories, and in answer to a question the witness deposes as to the contents of a written instrument, then objection may be taken after the return of the deposition, as that would be the first opportunity to object: *Ibid.*

ment of the government may refuse to comply with such request if in his opinion a compliance would be injurious to the public interest.[1] And if it appears to the court that the facts set forth in a petition do not furnish ground for relief, the court should refuse to allow the taking of testimony.[2] No witness can be excluded in any suit in the Court of Claims on account of color.[3] Nor, in any suit brought under the Tucker act, because he is a party to or interested in the suit; and any plaintiff or party in interest may be examined as a witness on the part of the Government.[4]

The former statutory provision excluding as witnesses those having an interest in the claim against the government was the old common law doctrine as it stood before the adoption of the act of Congress of July 16, 1862, now incorporated into section 858 of the Revised Statutes. The latter section provides that no witness shall be excluded in any civil action because he is a party or interested in the issue to be tried, except in certain special cases.[5]

If a corporation were a claimant, the trustees of the corporation were competent witnesses, as they were not supposed to be interested.[6] So where a party sold property to the claimant, and it was afterwards captured by the United States, the former was held to be a competent witness to sustain the claim therefor.[7] So if a witness had testified against a claim, his testimony would not have been excluded, however manifest his interest might be in the claim. Those only were incompetent on account of interest who had an interest in sustaining the claim.[8]

[1] Rev. Stat. § 1076.

[2] Rev. Stat. § 1077.

[3] Rev. Stat. § 1078.

[4] Act of March 3, 1887, § 8.

[5] Rev. Stat. § 858; United States *v.* Clark, 96 U. S. 37; s. c., 11 Ct. Cl. 698; Jones *v.* United States, 1 Ct. Cl. 383; McKee *v.* United States, *Ibid.* 336; Brooke *v.* United States, 2 *id.* 180; Stoddart *v.* United States, 4 *id.* 511.

[6] Hebrew Congregation *v.* United States, 6 Ct. Cl. 241.

[7] United States *v.* Anderson, 9 Wall. 56; Grossmeyer *v.* United States, 4 Ct. Cl. 1.

[8] Wood *v.* United States, 10 Ct. Cl. 395. A surety on a bond, given by the claimant to the United States to secure the fulfillment of a contract on which the claim is based, was not competent to testify in favor of the claimant: *Ibid.*; Macauley's Case, 11 Ct. Cl. 575.

When the Claimant may be Examined as a Witness.

§ 422. At the instance of the attorney or solicitor appearing on behalf of the United States, the court may make an order in any case pending therein, directing the claimant to appear upon reasonable notice before any commissioner of the court and be examined touching any or all of the matters pertaining to the claim. Such examination is required to be reduced to writing by the commissioner and to be returned to and filed in the court, and it may, in the discretion of the attorney or solicitor of the United States appearing in the cause, be read and used in evidence on the trial of the cause. If the claimant fails to appear or refuses to testify or answer as to all matters within his knowledge material to the issue after reasonable notice thereof, the court may order that such cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises.[1]

Under the provisions of the section last cited, it has been held that no order can be made for the examination of the assignor of the claimant. The examination provided for by this section is limited to the claimant himself, and cannot be extended to other persons. He alone by the provisions of the section can be held responsible for his non-attendance as a witness, after reasonable notice; he alone can be affected by his refusal to testify; and it is only for his refusal that the court can delay the trial until he shall have fully complied with the order of the court in that behalf.[2]

The Testimony to be Taken in the County where the Witness Resides; how Witnesses Compelled to Attend.

§ 423. The statute particularly requires that the testimony in cases pending in this court shall be taken in the county where the witness resides, when it can be conveniently done; and the court may issue subpœnas to require the attendance of a witness

[1] Rev. Stat. § 1080. This section is not repealed by the Indian Depredations act, 1891, and is applicable to cases arising under it. The order may be granted on an *ex parte* application: Truitt *v.* U. S., 30 Ct. Cl. 19. There is no other method by which the Government can take the deposition of the claimant with the privilege of using it or not, at its option: Earhart *v.* U. S, *Ibid.*, 343.

[2] Macauley *v.* United States, 11 Ct. Cl. 575.

before any person appointed commissioner by the court for that purpose; and the subpœnas have the same effect as if issued from any district court, and compliance therewith may be compelled under rules and orders of the court.[1]

Either Party may Cross-examine Witnesses.

§ 424. The statute provides that in taking testimony to be used in support of a claim, the United States shall have an opportunity to file interrogatories, or by attorney to examine witnesses under such regulations as the court may prescribe; and that like opportunities shall be afforded to the claimant in cases where testimony is taken on behalf of the United States under like regulations.[2] And the commissioner taking testimony to be used in this court is required to administer an oath or affirmation to the witnesses brought before him for examination.[3]

Fees of the Commissioner and other Expenses; by Whom Paid.

§ 425. The fees of the commissioner before whom a deposition is taken, and the costs of the commission and notices, shall be paid by the claimant, when the testimony is taken on his behalf; but when taken at the instance of the government such fees, together with all postage incurred by the Assistant Attorney-General, shall be paid out of the contingent fund provided for the Court of Claims, or other appropriation made by Congress for that purpose.[4]

When Claims will be Forfeited for Fraud.

§ 426. "Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement or establishment or allowance of any claim against the United States, shall *ipso facto* forfeit the same to the government; and it shall be the duty of the Court of Claims in such cases to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the government, and that the claimant be forever barred from prosecuting the same."[5]

[1] Rev. Stat. §§ 1081, 1082.
[2] Rev. Stat. § 1083.
[3] Rev. Stat. § 1084.
[4] Rev. Stat. § 1085.
[5] Rev. Stat. § 1086.

The Judgment or Decree.

§ 427. The judgment or decree of the Court of Claims on a final hearing, if in favor of the claimant, must be for a certain specific sum.[1] If the claim is made by an accounting officer, for a loss of the money or other property of the United States without his fault, the court should decree in his favor the amount thereof.[2] A proceeding to recover the proceeds of captured or abandoned property is in the nature of a proceeding *in rem*, and is in effect an information against a fund in the possession of the United States, held for the parties interested in it. There can be no liability in such a case if there is no fund. If it has been consumed in expenses or other legitimate purposes, there is no ground for the claim. If only a part of the original fund remains, the balance having been paid out under a judgment, or been released to other claimants having an interest in it, by the Secretary of the Treasury, the claimant can only obtain judgment for the balance.[3]

When the Court may Grant a New Trial.

§ 428. "When the judgment is rendered against any claimant the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial."[4]

The general principles of the law will be observed in granting new trials by this court. Thus, a new trial will not be granted on the ground of newly-discovered evidence, if it could have been discovered with due diligence before the trial. And even where due diligence has been used for this purpose, a new trial will not be granted unless it is made to appear that a different conclusion would probably be reached if the new evidence were before the court.[5] Nor will a new trial be granted merely because the

[1] United States *v.* Anderson, 9 Wall. 56; s. c., 4 Ct. Cl. 467; Brown *v.* United States, 6 Ct. Cl. 171. The court does not lose jurisdiction with the expiration of the term unless a final judgment has been rendered: Book *v.* U. S., 31 *id.* 272.

[2] Rev. Stat. § 1062.

[3] Thomas *v.* United States, 12 Ct. Cl. 273; Sharp *v.* United States, *Ibid.* 638; Seviere *v.* United States, 7 *id.* 388; Winchester *v.* United States, 14 *id.* 13; s. c., 99 U. S. 1372; United States *v.* Villalonga, 23 Wall. 35.

[4] Rev. Stat. § 1087.

[5] Garrison *v.* United States, 2 Ct. Cl. 382; Armstrong *v.* United States,

amount involved is too small to allow an appeal.[1] But if the decision is founded upon a mistake of law, the claimant may have a review.[2] So if the judgment is entered upon matters not properly in evidence, it will be vacated and a new trial granted.[3]

A new trial will not be granted on the ground that the Supreme Court has made some decisions since the judgment that might entitle the claimant to a judgment in his favor;[4] nor on the ground of a mistake in fact, unless one of the judges who joined in rendering the judgment desires a reargument after examining the grounds of mistake upon which it is asked.[5] The mode of seeking a new trial would be the usual one, by motion in writing, stating specifically the particular grounds upon which it is based, accompanied by the usual affidavits of facts outside the record where it rests upon such facts.

Where a case is not properly an examined and allowed case within the meaning of the Indian Depredations act, 1891, the defendants cannot be compelled to assume the burden of proof by electing to reopen it.[6] Otherwise where it is a preferred case. Any defence may be set up in such a case.[7]

When a New Trial will be Granted on the Motion of the United States.

§ 429. At any time while a claim is pending before the Court of Claims, or on appeal from it, or within two years next after the final disposition of it, the court may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong or injustice in the premises has been done the United States; but until some order

6 *id.* 226; Deeson *v.* United States, *Ibid.* 227; Bramhall *v.* United States, *Ibid.* 238; Child *v.* United States, *Ibid.* 44; Silvey *v.* United States, 7 *id.* 305. See as to re-opening cases: Wade *v.* U. S., 21 *id.* 141; Wynn *v.* U. S., 29 *id.* 15; Griffin *v.* U. S., 25 *id.* 293.

[1] Deeson *v.* United States, 6 Ct. Cl. 227.

[2] Calhoun *v.* United States, 14 Ct. Cl. 193.

[3] Alvord *v.* United States, 9 Ct. Cl. 133.

[4] Bramhall *v.* United States, 6 Ct. Cl. 238.

[5] Fendall *v.* United States, 12 Ct. Cl. 305.

[6] Mares *v.* U. S. & Jicarilla Apache Indians, 29 Ct. Cl. 197.

[7] Cox *v.* U. S. & Bannock Indians, 29 Ct. Cl. 349.

is made staying the payment of the judgment, the same is payable as provided by law in other cases.[1]

The words "final disposition," used in the section last cited, have been construed to mean the final disposition on appeal, if an appeal is taken, and if none is taken, then the final decision of the Court of Claims; and that court may grant a new trial, in the case provided for, at any time within two years after a final disposition, even though it may have been affirmed on appeal in the Supreme Court.[2] A mandate from the latter court does not affect that power.[3]

If after a "final disposition" of a claim a motion for a new trial is granted by the Court of Claims, after an appeal is taken and while it is pending, this vacates the former judgment, and the court resumes the control of the case and the parties, and the Supreme Court will not grant a *certiorari* to bring up the proceedings subsequent to the appeal; but after a final judgment on the new trial the case may be taken to the Supreme Court for review.[4] The proper course to take in such a case would be to move to dismiss the appeal in the Supreme Court on a proper showing of the facts, or to have the cause continued in the Supreme Court. But the mere filing of a motion for a new trial would be no ground for dismissing the cause in that court,[5] although the cause may be continued to await the decision on the motion for a new trial.

The term "evidence" in this section includes testimony taken in the form of question and answer. Under the statute, if the witness appears to be unwilling, the government is entitled to the most effective form of examination. The Court of Claims has power to enforce obedience to a subpœna and to compel a witness to appear and testify in regard to a motion for a new trial.[6]

One of the grounds for obtaining a new trial under the provisions of the section of the Revised Statute last referred to is that some "injustice has been done to the United States." The injustice contemplated by this provision is not that resulting

[1] Rev. Stat. § 1088.

[2] *Ex parte* Russell, 13 Wall. 664; *Ex parte* United States, 16 *id.* 699.

[3] Belknap *v.* U. S., 150 U. S. 588.

[4] United States *v.* Young, 94 U. S. 258; United States *v.* Ayers, 9 Wall. 608.

[5] United States *v.* Crusell, 12 Wall. 175.

[6] *In re* McKay, 30 Ct. Cl. 1.

merely from judicial errors committed on the trial, but such as are discovered after the rendition of the judgment.[1] And a new trial will not be granted on the ground of newly-discovered evidence unless there was due diligence to discover it before the trial; and the obligation to use diligence in such cases falls upon the officers whom the law requires to take official cognizance of the suit, or who are charged in law or in fact with its defence.[2] Nor will it be granted in any case on the ground of newly-discovered evidence, if the new evidence would not change the result; or for an error in law, where there is ample remedy by appeal.[3]

Final Judgments of the Court of Claims; how Paid.

§ 430. Section 1089 of the Revised Statutes provides for the payment of all judgments in this court, or on appeal in the Supreme Court in favor of claimants, as follows: "In all cases of final judgments in the Court of Claims, or on appeal, by the Supreme Court, where the same are affirmed in favor of the claimants, the sum due thereby shall be paid out of any general appropriation made by law for the payment or satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment certified by the clerk of the Court of Claims and signed by the Chief Justice, or in his absence by the presiding judge of said court."

The act of March 3, 1875,[4] restricts the provisions of the foregoing section, and makes it the duty of the Secretary of the Treasury in such cases, if the plaintiff or claimant is indebted to the United States in any manner, to withhold payment of an amount of such judgment or claim equal to the debt due to the United States. If the claimant assents to this, then it is the duty of the Secretary to execute a discharge of the debt due from the plaintiff or claimant to the United States. But if he denies the indebt-

[1] Child *v.* United States, 6 Ct. Cl. 44.

[2] Silvey *v.* United States, 6 Ct. Cl. 305.

[3] Ealer *v.* United States, 5 Ct. Cl. 708; Child *v.* United States, 7 *id.* 305. A decision on a motion for a new trial cannot be taken to the Supreme Court by appeal: Young *v.* United States, 99 U. S. 641.

[4] Act of March 3, 1875, ch. 149, 18 Stat. L. 481. All accounts and judgments of the Court of Claims are to go to the Auditor for the State and other Departments, by act of July 31, 1894, ch. 174, § 7, 28 Stat. L. 162, 2 Supp. R. S. 214.

edness to the United States, or refuses to consent to the set-off, then the Secretary is required to withhold such further amount of such judgment or claim as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to a final judgment. If such is not already in suit, it is made the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. If in such action judgment shall be rendered against the United States, or the amount recovered for the debt and costs shall be less than the amount withheld, he is required to pay over the balance to the plaintiff, with six per cent. interest thereon for the time it has been so withheld from him.

This provision requires the amount of any debt due from the claimant to the United States to be withheld by the Secretary of the Treasury, although this might have been set up as a defence to the claim. The statute conferring jurisdiction on the court gives it jurisdiction to hear and determine "all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government of the United States against any person making claim against the government in said court." As a general rule, in suits between private parties, such a defence should be made in the original suit; but, as the allowance of such suits against the government is a mere matter of grace, it has a legal right to impose such conditions and restrictions in the premises as it thinks proper. Experience has probably shown that legal defences on the part of the government are frequently overlooked, or, through negligence of officers or otherwise, not made.

The term general appropriation for private claims, used in the statute, has been held to mean appropriations made for the payment of debts which were not paid out of the specific appropriations.[1] If the claimant consents to take the balance due him after deducting the set-off claimed by the Secretary, and discharges the judgment, he thereby waives the right to have the validity of the debt tested by legal proceedings.[2]

[1] Sweeny *v.* United States, 5 Ct. Cl. 285.

[2] Bonnafon *v.* United States, 14 Ct. Cl. 484.

Interest on Judgments of the Court of Claims Affirmed in the Supreme Court.

§ 431. Where a judgment is affirmed in the Supreme Court in favor of the claimant, on an appeal from the Court of Claims, interest thereon at the rate of four per centum must be allowed from the date of filing the transcript of judgment in the Treasury Department up to and including the date of the mandate of affirmance by the Supreme Court; but in no case is it allowed after the term of the Supreme Court at which the judgment was affirmed.[1] Where a judgment is affirmed, so far as it is in favor of a claimant and reversed so far as it is adverse to him, he is entitled to have interest added by the Court of Claims on the former and incorporated into the final judgment rendered under the mandate.[2] No interest can be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating therefor.[3] But where a factor filed a claim against the proceeds of captured property, which exceeded his claim, he was allowed interest from the time his claim accrued up to the time of the rendition of the judgment.[4] And where a claim was referred to the Court of Claims under a special act of Congress, to be determined

[1] Act of Sept. 30, 1890, ch. 1126, par. 4, 26 Stat. L. 504, 1 Supp. R. S. 811.

[2] State of New York *v.* U. S., 31 Ct. Cl. 276.

[3] Rev. Stat. § 1091; Todd *v.* United States, Dev. (C. C.) 175; Tilson *v.* United States, 100 U. S. 43. And see U. S. *v.* Bayard, 127 *id.* 251; Western Cherokee Indians *v.* U. S., 27 Ct. Cl. 1. Section 10 of the Tucker Act refers only to the judgments of circuit and district courts and does not repeal or modify Rev. Stat. §§ 1090 and 1091: U. S. *v.* Barber, 74 Fed. Rep. 483. A circuit court has no jurisdiction to award interest on a judgment rendered by the Court of Claims without making provision for interest which has been paid. Such interest is merely an incident to the judgment and its allowance was for the determination of the latter court: Walton *v.* U. S., 61 Fed. Rep. 486; Bunton *v.* U. S., 62 *id.* 171. Where the Government is sued as trustee of an Indian tribe and the judgment will be satisfied out of a trust fund, interest in the nature of damages cannot be recovered: Citizen Indians of the Weas *v.* U. S., 26 Ct. Cl. 323. Though interest prior to the judgment cannot be allowed to claimants against the United States, the provisions of Rev. Stat., § 966 peremptorily require it to be allowed to the United States, against claimants, under all circumstances to which the statute applies and without regard to equities which might be considered between private parties: U. S. *v.* Verdier, 164 U. S. 213.

[4] Villalonga *v.* United States, 10 Ct. Cl. 428; s. c., 23 Wall. 35.

according to "rules and regulations heretofore adopted by the United States in the settlement of like cases," it was held that interest might be allowed on the claim before the rendition of the judgment, if interest had been allowed by Congress in the adjustment of similar cases.[1] Where Congress appropriated in payment of a judgment against the United States the full amount thereof, with a provision in the appropriation law that the sum thus appropriated should be in full satisfaction of the judgment, and the judgment debtor accepted the sum in payment of the judgment debt, it was held that the debtor was estopped from claiming interest under section 1090 of the Revised Statutes.[2]

Payment of the Judgment a Full Discharge.

§ 432. The payment of the amount due upon any judgment of the Court of Claims and of any interest thereon allowed by law is a full discharge of the United States from all claim and demand touching any of the matters involved in the controversy.[3]

To constitute a bar to a future action the judgment must be one rendered on the merits;[4] and although the judgment may be erroneous, it is a bar to a second suit for the same cause of action.[5] But a judgment in one suit will not bar an action in another if the causes of action are different.[6] So an action for a breach of one covenant and a judgment therefor for the claimant will not bar another action for the breach of another covenant, even when both covenants are contained in the same instrument and both were broken at the time of the institution of the first suit.[7] So a judgment for rent upon one petition will not bar another suit to recover rent that was not due at the time of commencing the first suit.[8]

Appeals from the Court of Claims to the Supreme Court.

§ 433. Section 707 of the Revised Statutes provides for an appeal from the Court of Claims to the Supreme Court of the

[1] United States *v.* McKee, 91 U. S. 442; s. c., 10 Ct. Cl. 231.

[2] Pac. R. Co. *v.* U. S., 158 U. S. 118.

[3] Rev. Stat. § 1092. See Michot *v.* U. S., 31 Ct. Cl. 299.

[4] Spicer *v.* United States, 5 Ct. Cl. 34.

[5] Osborne *v.* United States, 9 Ct. Cl. 153.

[6] Shrewsbury *v.* United States, 9 Ct. Cl. 263.

[7] Shrewsbury *v.* United States, 9 Ct. Cl. 263.

[8] Cross *v.* United States, 14 Wall. 479; s. c., 5 Ct. Cl. 88.

United States, as follows: "An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section 1089 [1086?]."

There is an absolute right of appeal on behalf of the United States and also on behalf of the claimant where the amount in controversy exceeds the sum of three thousand dollars, or where his claim is forfeited to the United States by the judgment of the Court of Claims, as provided by the statute. The right to an appeal exists in all cases except where it is withheld, and it is not withheld from the government in any case where there is a judgment against them, nor from the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim has been forfeited.[1] The conclusion of law in a departmental case, whether it came into court under the Bowman or the Tucker act, is not a judgment, so no appeal therefrom lies to the Supreme Court.[2]

Right to Appeal, not to Writ of Error.

§ 434. The statute gives the right to an appeal, but makes no provision for a writ of error, and hence the Supreme Court cannot proceed on a writ of error to review a decision of the Court of Claims.[3]

Time and Manner of Taking Appeals.

§ 435. Appeals from the Court of Claims must be taken within ninety days after the judgment or decree is rendered, and are allowed under such regulations as are or may be prescribed by the Supreme Court.[4]

Regulations Prescribed by the Supreme Court of the United States relating to Appeals from the Court of Claims.

§ 436. The Supreme Court of the United States has prescribed rules regulating appeals from the Court of Claims. One rule

[1] United States *v.* Adams, 6 Wall. 103; Klein's Cases, 7 Ct. Cl. 240.

[2] Sanborn *v.* U. S., 27 Ct. Cl. 485. The order of court that a certificate issue under the French Spoliations act of 1891 is not a judgment: Adams *v.* U. S., 26 *id.* 290.

[3] United States *v.* Young, 94 U. S. 258; Latham's Appeal, 9 Wall. 145.

[4] Rev. Stat. § 708.

provides that where appeals are allowable they shall be heard in the Supreme Court upon the following record:

"1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments and decrees as may be necessary to a proper review of the case.

"2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record."[1] If a statute confers on the Court of Claims jurisdiction over a new subject, an appeal lies from a decision relating thereto the same as in other cases.[2]

Application for Allowance of Appeals; Within what Time to be Made.

§ 437. Rule 3 provides that "in all cases an order for the allowance of appeal by the Court of Claims, or the Chief Justice in vacation, is essential, and the limitation of the time of granting such appeal shall cease to run from the time an application is made for the allowance."[3] An order for the allowance of an appeal does not absolutely and of itself remove the cause from the jurisdiction of the court; but an order revoking such an allowance may still be made.[4]

Findings of Fact and Conclusions of Law Filed in Open Court.

§ 438. Where either party is entitled to appeal, the Court of Claims is required to make and file their finding of facts and conclusions of law thereon in open court, before or at the time they enter the judgment in the case.[5]

[1] Rule 1 Ct. Cl., prescribed by the Supreme Court. See *post*, Rules for the Court of Claims.

[2] *Ex parte* Zellner, 9 Wall. 244.

[3] Rule 3 Ct. Cl., prescribed by the Supreme Court; United States *v.* Adams, 6 Wall. 101.

[4] *Ex parte* Roberts, 15 Wall. 384. Where an appeal has been allowed and the record filed in the Supreme Court, the Court of Claims has lost jurisdiction and cannot set aside the allowance of the appeal: Kirk *v.* U. S., 28 Ct. Cl. 276.

[5] Rule 4 Ct. Cl., prescribed by the Supreme Court.

If a proper finding of facts is not sent up with the record, the Supreme Court will, on a motion duly made therefor, make an order directed to the Court of Claims, requiring it to make a proper return as to the existence of such facts. But it cannot direct the Court of Claims as to what finding it shall make, or how it shall proceed to make its findings on the points required to be certified.[1]

In the case provided for by the rule last cited each party, at such time before the trial and in such form as the court shall prescribe, shall submit to it a request to find all the facts which the party considers proven, and deems material to the due presentment of the case, in the finding of facts.[2]

The fourth and fifth rules we have just cited were undoubtedly designed to enable a party to secure a finding of fact upon any point material to the decision of the court; but the failure of the court to find the fact as a party alleges it to be will not justify the bringing of all the evidence on that subject before the Supreme Court. If the court refuses to make any finding on the point, the Supreme Court may order it to make a finding.[3]

If the Court of Claims refers a case pending therein to a special commissioner to state an account and find the facts, and his report has been heard upon exceptions filed thereto, and the court finds the facts found sustained by the evidence, they will be returned to the Supreme Court, in case of an appeal of the case, as the finding of the court. And as to facts requested to be found by either party, and not found by the court, they should be certified up to the Supreme Court, with the reasons for the refusal.[4]

The record on appeals should be prepared strictly in accordance with the rules prescribed by the Supreme Court in relation thereto. Only such statement of facts should be sent up to the Supreme Court as may be necessary to enable it to decide upon the correctness of the rulings in the court below on propositions of law. The facts found by the court must be in such form as to raise the question of law decided by the court, and no evidence

[1] United States *v.* Adams, 9 Wall. 661.

[2] Rule 5 Ct. Cl., prescribed by the Supreme Court.

[3] Mahan *v.* United States, 14 Wall. 109.

[4] Lawrence *v.* United States, 8 Ct. Cl. 252.

should be included.[1] Even a written agreement entered into by both parties that the evidence may be sent up to the Supreme Court with the required record of the case will not authorize the court to certify up such evidence.[2]

The finding of facts by the Court of Claims in the nature of a special verdict is conclusive in the Supreme Court on appeal, unless it is impeached for some error in law appearing in the record.[3] But where the Court of Claims certified up on appeal, as a part of its findings, all of the evidence on which a fact material to the judgment rendered was found, from which it appeared that there was no legal evidence to establish such fact, the Supreme Court reversed the judgment.[4] When the finding does not disclose the testimony, but only describes its character and, without questioning its competency, simply declares its insufficiency, the Supreme Court is not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings.[5]

Where a Request is Made to Find Facts.

§ 439. If a party entitled to appeal requests the finding of a material fact, which is refused by the court, although there is sufficient evidence to sustain it, the party aggrieved thereby may except to the ruling and have the matter reviewed on appeal.[6]

The request for the finding of particular facts must be in writing and made at the trial, and embrace all the material facts in the case; and if it be for an additional finding of facts, it should set forth specifically, distinctly and concisely the facts as to which a finding is desired, and a reference should be made in the margin of the pages where the evidence to prove the facts may be found; but it should not ask that the finding be an amendment or alter-

[1] De Groot *v.* United States, 5 Wall. 419.

[2] Hubbel *v.* United States, 6 Ct. Cl. 53. It is only the ultimate facts or propositions which can be certified up, and not the evidence of facts: *Ibid.*

[3] United States *v.* Smith, 94 U. S. 214; United States *v.* Pugh, 99 *id.* 265.

[4] United States *v.* Clark, 96 U. S. 37.

[5] Stone *v.* U. S., 164 U. S. 380.

[6] United States *v.* Adams, 9 Wall. 661.

ation of the finding already made.[1] Decisions upon the admissibility of evidence, and orders made relating to the conducting of the trial, cannot be incorporated into the finding of the facts.[2] But if the Court of Claims admits questionable evidence, the sufficiency of the evidence, as we have seen, to sustain the finding may be reviewed on a proper statement of the facts.[3]

If the report of the commissioner appointed by the Court of Claims is adopted by the court, the finding of facts by him, together with such additional findings as the court may make, should be transmitted to the Supreme Court as the findings of the Court of Claims.[4]

If an ultimate fact can only be inferred from circumstantial facts, and there is any doubt as to the legal effect of these facts, the findings should set forth these circumstantial facts.[5] But the findings need not state the items of the amount of damages.[6] If all the evidence on which a fact is found is certified up with the record as a part of the finding, the evidence and the finding may both be examined to determine whether the evidence is competent and whether it establishes the fact found.[7] But if the court, upon request, states that a particular item of damages is included in its estimate of damages, the claimant may except to the finding on this point, and thus present, on appeal to the Supreme Court, the question whether the item is legally a matter for which damages can be recovered.[8] And if the finding of facts does not set forth the amount the claimant is entitled to recover, the judgment will be reversed.[9]

Court of Private Land Claims.

§ 440. By the act of March 3, 1891, this court was established and its proceedings regulated.[10] The act was amended by the

[1] Raines *v.* United States, 11 Ct. Cl. 648; Neal *v.* United States, 14 *id.* 477; Bright *v.* United States, 12 *id.* 646.

[2] Blewett *v.* United States, 10 Ct. Cl. 235.

[3] McKeever *v.* United States, 14 Ct. Cl. 396.

[4] Lawrence *v.* United States, 8 Ct. Cl. 252.

[5] United States *v.* Pugh, 99 U. S. 265; Calhoun *v.* United States, 14 Ct. Cl. 193.

[6] United States *v.* Smith, 94 U. S. 214.

[7] United States *v.* Clark, 96 U. S. 37.

[8] United States *v.* Smith, 94 U. S. 214.

[9] United States *v.* Clark, 96 U. S. 37.

[10] Act of March 3, 1891, ch. 539, 26 Stat. L. 854, 1 Supp. R. S. 917.

act of February 21, 1893.[1] It is unnecessary to set out the details of these statutes, for by the act of March 2, 1895, it is provided that "the powers and functions of the court . . . shall cease and determine on the thirty-first day of December, eighteen hundred and ninety-seven, and all papers, files and records in the possession of said court belonging to any other public office of the United States shall be returned to such office, and all other papers, files and records in the possession of or appertaining to said court shall be returned to and filed in the Department of the Interior."[2] An inchoate claim which could not have been asserted as an absolute right and was subject to the uncontrolled discretion of Congress was held not to come within the jurisdiction of this court. The duty of protecting such imperfect rights of property rests upon the political department of the government.[3] And the fact that Congress may have confirmed similar grants cannot operate to justify this court in the adjudication of a case not coming within the terms of the law of its creation.[4]

We here insert the whole of Chief Justice Richardson's pamphlet entitled "History, Jurisdiction and Practice of the Court of Claims."

HISTORY.—Previous to the year eighteen hundred and fifty-four the accumulation of private claims against the Government of the United States presented to Congress for examination and relief had, at various times, engaged the attention of Senators and Representatives. It was seen and acknowledged by them all that it was beyond the power of Congress or its committees to make a thorough investigation of those claims, or to act intelligently upon the large and constantly increasing number of petitions introduced at each session in behalf of persons having claims of various kinds for which they sought relief. Claimants

[1] Act of Feb. 21, 1893, ch. 149, 27 Stat. L. 470, 2 Supp. R. S. 88.

[2] Act of March 2, 1895, ch. 177, par. 22, 28 Stat. L. 744, 2 Supp. R. S. 417.

[3] U. S. *v.* Santa Fé, 165 U. S. 675. An imperfect grant which can be confirmed by this court must be one which the complainant could by right, and not by grace, have demanded should be made perfect by the former government had the territory not been acquired by the United States: Bergere *v.* U. S., U. S. Sup. Ct. Advance Sheets, Nov. 15, '97, p. 11.

[4] Rio Arriba L. & C. Co. *v.* U. S., 167 U. S. 298.

had gone to Congress, and would continue to go there, as a matter of right secured to them by the first article of the amendments to the Constitution of the United States, guaranteeing to the people the privilege to petition the Government for redress of grievances.

It was seriously felt both in and out of Congress that the constitutional guaranty was of little value, and was substantially violated if private claimants against the government were allowed merely the naked right to have their petitions presented, without any further investigation and consideration.

To neglect to hear petitioners, or not to act upon their complaints when heard, was practically the same to them as would be the effect of a law expressly abridging the right of petition in direct and flagrant violation of the Constitution.

And yet such was the extent of these claims, and the difficulty of reaching the real facts in each case, that few of them were ever acted upon, and many honest creditors of the United States were turned away without a hearing, and others were deterred from presenting their petitions for redress by the difficulties in the way of ever reaching a final determination, while it was occasionally found that, upon hasty consideration or imperfect *ex parte* evidence, a claim was allowed and paid which was, to say the least, of doubtful validity.

Committees could not constitute themselves courts for the trial of facts. They had not the time to devote to that kind of investigation, to the interruption or exclusion of their duties to the country on the great national questions which were always pending in Congress. They could not effectively examine the claimants' witnesses to any great extent before themselves, and they were not sufficiently familiar with the matters in controversy to be able to procure witnesses for the Government. Claimants, in fact, presented only *ex parte* cases, supported by affidavits and the influence of such friends as they could induce to appear before the committees in open session, or to see the members in private. No counsel appeared to watch and defend the interest of the Government. Committees were, therefore, perplexed beyond measure with this class of business, and most frequently found it more convenient and more safe not to act at all upon those claims which called for much investigation, espe-

cially when the amounts involved seemed large. Moreover, when bills for relief in meritorious cases were reported, few of them were acted upon by either House, or, if passed by one, were not brought to a vote in the other House, and so fell at the final adjournment, and if ever revived, had to be begun again before a new Congress and a new committee, and so on year after year and Congress after Congress.

Several plans for relief were from time to time proposed by bills, resolutions, or motions, or were suggested by Senators and Representatives in the course of debate. But no measure was carefully and fully considered until the second session of the Thirty-third Congress, in the year eighteen hundred and fifty-four.

On the sixth of December of that year Senator Brodhead, of Pennsylvania, in pursuance of previous notice, asked and obtained leave to introduce a bill establishing a commission for the examination and adjustment of private claims, which was read a first and second time by its title and referred to the Committee on Claims. This was a carefully drawn and well-prepared bill. It had evidently been considered by members of the committee and had their concurrence before its introduction, for it was soon reported back without amendment. When the bill came up for discussion in the Senate, it soon became apparent that the prevailing opinion of members was that something more was needed than a mere commission, with its members appointed for a term of years, or removable at the pleasure of the Executive. It was seen that there would be frequent changes of commissioners with the change of parties or the incoming of new administrations, and that with the constant liability of removal the independence of the commissioners would be greatly weakened and their usefulness much impaired. Besides, men of ability and learning in the law would not give up their position and practice to accept such semi-judicial offices, subject to removal at any time. The desire expressed was to have an independent and permanent tribunal, which should pass upon the claims made against the Government with all the formalities, safeguards, and judicial learning which distinguish courts of justice established for the trial of causes between individuals.

Senator Hunter, of Virginia, suggested some amendments and proposed the appointment of judges with life tenure, instead of commissioners, as the best means of securing that complete independence which it was important to establish, and of obtaining the best men to fill the positions. He said:

"When these safeguards are provided, I think we should establish the most admirable tribunal for doing justice to private claimants, and, at the same time, for throwing proper checks about the Treasury of the United States, that could be established."

After this discussion the bill was referred on the 18th of December, 1854, to a select committee composed of Senators Brodhead, of Pennsylvania, Jones, of Tennessee, Hunter, of Virginia, Clayton, of Delaware, and Clay, of Alabama. On the 20th of December this committee reported a substitute entitled "An act to establish a Court for the investigation of claims against the United States." This bill differed from the former one very little, except in the important feature of establishing a permanent and independent court instead of a commission. The bill thus drawn met the approval of the Senate, and on the 21st of December it passed that body, without a vote recorded against it.

The bill reached the House of Representatives on the 24th of December, and was referred first to the Judiciary Committee, but this reference was changed and it was sent to the Committee on Claims. It was soon reported back with some amendments which did not alter the main features of the bill, and was passed by the House on the 23d of February, 1855, by a vote of 150 to 46. Two days after, February 25, the bill was signed by the President and became a law.[1]

The act required the appointment of three judges by the President, by and with the advice and consent of the Senate, to hold their offices during good behavior. President Pierce appointed two of them on the 3d of March, and the other on the 8th of May, 1855. They organized on the 11th of May, 1855, making choice of Judge Gilchrist as Presiding Judge, and immediately entered upon the discharge of their duties.

The magnitude and difficulties of the business of the court,

[1] 10 Stat. L. 612.

with its peculiar jurisdiction, are well presented in a report made to Congress by Judge Gilchrist, for himself and his associates, bearing date June 23, 1856, from which the following extracts are taken:

"As to the business of the court, we are convinced that no one who has not had personal experience on the subject can have any correct idea of its diversity, its intricacy, its perplexity, the exhausting labor necessary for its investigation, or the large sum of money it involves. Until the institution of this court, there had never been anything like a systematic inquiry into the modes of action by the Government through the Executive Departments, or the relation in regard to contracts and the liabilities arising therefrom which the Government bore to the citizens. It was inevitable, and it is astonishing that it should not have been sooner perceived, that among twenty-five millions of people, inhabiting the almost boundless territory comprehended by the Union, innumerable questions of the most difficult and delicate nature must have arisen, delays in the decision of which were alike discreditable to the moral sense of the people and the public faith of the Government, of which the people were the foundation. It has been often asserted, and proved by the experience of the British Parliament, that legislative bodies are unfitted, by the pressure of great public interests, from careful judicial investigation into private rights. The consequence has been in our country that claims accumulated until their magnitude repressed all willingness to investigate them, and a state of things arose which made it hopeless almost to present a claim against the United States with any prospect of a decision. Such was the condition of affairs when we entered upon the discharge of our duties. Our field of action was entirely new. We had no precedents to guide us. It was necessary at once to adopt some system of rules for the transaction of business. The ordinary rules of practice in courts of law were obviously inapplicable. We were forced to adopt rules in advance of any experience upon the subject, conscious that we should be forced often to modify and sometimes to abrogate them. We found numerous cases involving questions entirely out of the path of ordinary legal investigation, requiring a degree of care and study rarely necessary in courts of justice. Cases of contracts, intricate

in their details, imperfectly defined by the evidence, reducible with difficulty to any legal principles, and enormous in amount, met us at the threshold. Cases involving the proper construction of treaties, important questions of public law, and that most difficult and delicate of all questions, the responsibility of the United States to their citizens, were laid before us. The construction of acts of Congress, the legitimate powers of the Executive Departments, the duties and liabilities of Government officers, the constitutional powers of the General Government, the duties of neutral nations, and questions arising out of a state of war, were all, directly or incidentally, to be inquired into. It cannot be presumed that, with a due regard to our own reputation or to our official oaths, we were disposed to pass lightly upon questions of such momentous importance. Our object has been to give each case such a degree of care and patient attention as would enable us to use it as a precedent in subsequent cases of a like character. Our desire has been, not to get rid of the cases, but to decide them; and in order to do that they must be carefully examined."

The original act provided that at the commencement of each session of Congress, and at the commencement of each month during the session, the court should report the cases upon which they had finally acted, stating in each the material facts which they found established by the evidence, with their opinion in the case, and the reasons upon which such opinion was founded, and the opinion of any judge who should dissent from the majority. It also directed the court to prepare a bill or bills in those cases which received the favorable decision thereof in such form as, if enacted, would carry the same into effect. These provisions might perhaps have accomplished the desired result, and have proved satisfactory, had they not been accompanied with others which delayed and embarrassed the proceedings thereon in Congress, and, to a large extent, actually prevented any final action whatever. It required the court to transmit, with the reports, the briefs of the solicitor for the Government and of the claimant, and the testimony in each case.

The claims reported upon adversely were, by the terms of the act, to be placed on the calendar; and all reports and bills from the court were to be continued from session to session, and from

Congress to Congress, until finally acted upon. But claims reported favorably upon, and the accompanying bills, were not required to be placed upon the calendar. At the very outset, when the first report came in, the question arose as to what was to be done with the favorable reports and bills. It was decided to refer them to the Committee on Claims, and that course was ever after followed while the system of reporting to Congress continued.

The Committee on Claims finding a mass of evidence, with the briefs in each case, referred to them, very naturally felt it to be their duty to go carefully over the whole matter, to read all the evidence, and examine the briefs of the claimant and of the solicitor for the Government. Claimants were uneasy and pressing, and the troubles and perplexities of the members of the committee were numerous. To hear the cases anew, or to examine all the papers in each case and submit the questions which were raised on the facts and the law to the decision of the committee, would require more time and labor of the members than it was possible to devote to such duty. If the work which the court had done was thus to be all gone over again in committee, little was gained by reference to the court at all. In fact it was a positive loss and injury to the claimants, because they were forced to try their cases twice, while neither Congress nor claimants obtained relief. Favorable reports were often not concurred in or not acted upon at all, and were finally lost altogether.

This was not what the friends of the act establishing the court intended, nor what they hoped and expected to accomplish. In discussing the original bill in the Senate in December, 1854, Senator Hunter, of Virginia, had said: "I take it for granted that there would scarcely be a case in which Congress would not concur in the decision of a court thus established." It was no doubt supposed, as was said at a later date by a member of the House from Pennsylvania, that the bills reported by the court would be read over by the committee simply to "see whether there was anything contained in them which might be considered as trenching on the privileges or rights of the House, and if there were not, that they might be reported back for the House to act on them."

It was not foreseen that the committee would feel reluctant to take the responsibility of reporting back the bills without examination of the evidence upon which they were founded, evidence which the law required should be submitted to Congress, and which had been referred to them by vote of the House. Such was the inevitable consequence of laying the whole record in each case before Congress, and it defeated one great object of the act establishing the court, that of relieving Congress from the consideration of private claims upon the evidence. When this became apparent from actual experience, Congress, ever ready as it has been to sustain and increase the usefulness of the court, made important and radical changes and improvements in the organic act.

On the 3d of March, 1863, an amendatory act was passed,[1] of which the most material alterations were these:

Two additional judges were added to the court, making the number five. An appeal was allowed to the Supreme Court by either party where the amount should exceed three thousand dollars, and by the defendants in other cases. Every judgment was to be paid "out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the chief justice, or in his absence by the presiding judge." Interest was to be allowed upon judgments in certain cases in favor of claimants, when on appeal to the Supreme Court the same should be affirmed. The former requirement that the court should send to Congress the records, evidence, judgments, and bills was done away with.

These provisions still stand as the existing law.[2]

Some other amendments were made by the act relating to jurisdiction which we shall refer to hereafter, and others in relation to details of less consequence.

The last section of the act led to some difficulty. It provided that no money should be paid out of the Treasury for any claim passed upon by the court till after an appropriation therefor should be estimated for by the Secretary of the Treasury. The Supreme Court held that this authority given to the head of an

[1] 12 Stat. L. 765.

[2] Rev. Stat. §§ 1059, 1093.

Executive Department, by necessary implication, to revise the decision of the Court of Claims requiring the payment of money, denied to it the judicial power from the exercise of which appeals could be taken to that court, and they refused to take jurisdiction of any appeals from the Court of Claims.[1]

When that decision was promulgated, Congress, in March, 1866, repealed the section referred to,[2] and the Supreme Court has ever since entertained jurisdiction of such appeals.

From that time the business of the court has gone on smoothly, with no other difficulties than those incident to the trial and investigation of cases of such magnitude, and involving such intricate and peculiar questions as come before this court.

The Supreme Court has held that the Court of Claims exercises all the functions of a court, and is one of those courts which Congress authorizes under the Constitution, having jurisdiction of contracts between the Government and the citizen, from which appeal lies to the Supreme Court; and that its judgments, where no appeal is taken, are absolutely conc usive of the rights of the parties, just as conclusive as are the judgments of the Supreme Court.[3]

It is held by the Supreme Court that the provisions authorizing the Court of Claims to give judgment in favor of the United States against claimants without a trial by jury do not violate either the letter or spirit of the seventh amendment to the Constitution, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The court further says that: "Suits against the Government in the Court of Claims, whether reference be had to the claimant's demand or to the defense, or to any set-off or counter-claim which the Government may assert, are not controlled by the seventh amendment. They are not suits at common law within the true meaning."[4]

The constitutional organization of the court and its procedure without a jury are therefore authoritatively settled by the tribunal of last resort.

Since the organization of the court to June 1, 1885, the whole

[1] Gordon *v.* United States, 7 Ct. Cl. 13 Wall. 128; O'Grady's Case, 10 Ct. Cl. 134, and 22 Wall. 641.

[2] 14 Stat L. 9.

[3] Klein's Case, 7 Ct. Cl. 241, and

[4] McElrath's Case, 102 U. S. 440.

number of cases against the United States has been 14,602, besides 397 against the District of Columbia, exclusive of cases transmitted under the recent Bowman act, hereinafter mentioned. This large number of claims has been withdrawn from Congress and has been judicially disposed of. To that extent, therefore, the legislative branch of the Government has obtained relief from what are really and properly judicial duties.

In the first edition of this article it was said:

"There are still numerous claims pressing upon Congress wherein the petitioners appeal for special relief which the strict rules of law cannot afford them. Claims of this class are increasing and are a source of much embarrassment to both Senators and Representatives. It is uncertainty as to the real facts that gives rise to most of the difficulty. These, Congress, by its committees, cannot investigate and ascertain as they are proved and established in courts of justice. It may and probably will soon become necessary, if it has not already become so, to send such cases to the Court of Claims for findings of fact, to be submitted to Congress for its determination as to the law or the relief which should be applied to them. With the facts judicially determined, Congress would be able to act intelligently, safely, and readily upon the cases presented."

The next succeeding Congress acted upon the suggestion thus made, and finally passed the act of March 3, 1883,[1] commonly called the "Bowman Act," from Hon. S. Z. Bowman, a Representative from Massachussetts, who reported the bill from the Committee on Claims and had the charge of it in the House. It provides that when any claim *or matter* is pending before either House of Congress or any committee which involves the investigation and determination *of facts*, the same may be transmitted to the Court of Claims for hearing. When the facts are found, the same are reported to the House or to the committee from which the case was transmitted, for its consideration. No judgment is entered, no conclusions of law made, and no opinion is given, nor is the evidence returned. All that is reported back is the finding of facts.[2]

The same act authorizes the head of any Executive Depart-

[1] 22 Stat. L. 485, and 18 Ct. Cl. xxv. [2] Ford's Case, 19 Ct. Cl. 596.

ment to transmit to the court any claim or matter involving controverted questions of *fact or law*, requiring the court to find the facts and its conclusions of law, and to render an opinion; all of which is to be reported to the Department, *for its guidance and action.*

This act does not alter or affect the pre-existing judicial functions and jurisdiction of the court to hear, determine, and enter judgment in cases enumerated in Revised Statutes, § 1059. As no judgments are entered in cases under the Bowman act, there is no right of appeal, as in other cases within the jurisdiction of the court.

As supplementary to the statutes conferring absolute jurisdiction upon the court to hear, determine, and give judgment in cases founded upon contracts, express or implied, the laws of Congress, the regulations of the Executive Departments, and cases referred by either House of Congress where legal rights are claimed, all of which are well defined judicial powers, the provisions of the Bowman act, as aids to Congress and the Departments, perfect a complete system for the removal from the halls of legislation of all the troubles, vexation, and embarrassment incident to the consideration and disposition of private claims and demands of every kind against the Government which are not or cannot be settled in the ordinary processes of accounting, or otherwise, by the executive officers, in the exercise of their prescribed power and duties.

If parties have claims founded on contracts, laws, or regulations they can go to the court voluntarily with their petitions; if they have other legal rights, they may be referred there by either house of Congress under the general jurisdiction section. In all these cases the court determines the right of the parties judicially and conclusively by its final decision, and Congress is never-more troubled with them.

In cases growing out of treaties with foreign nations or Indian tribes, not now within the jurisdiction of the court,[1] and other like cases, Congress may refer the matters in controversy by special acts, as it frequently has done, for final adjudication and judgment.

All other matters which address themselves particularly to the sound discretion and liberality of Congress, and seek special relief not as a legal right, but as a concession by the law-making power, the determination of which cannot be delegated by legis-

[1] Rev. Stat. § 1066.

lators to others, but must be passed upon by themselves, may be transmitted to the court under the Bowman act, not for judicial determination and judgment, but for the finding of facts alone. When the facts are found, and clearly and concisely presented by the judges, it is not difficult for Congress to determine what measure of relief, if any, shall be accorded to the parties.

The system, now well established and matured during thirty years of practice and experience, of having all litigation against the Government tried before a bench of five judges, sitting together at the capital, has great and manifest advantage over that of scattering the cases all over the country, to be tried each before a single judge.

A great part of such litigation grows out of matter connected with the Executive Departments, where the documentary evidence is found. This fact is recognized and provided for in section 1076 of the Revised Statutes, which authorizes the court to call upon the Departments for information and papers, and such calls are constantly made. The practice and workings of all of the Departments are material for the judges to know and to become familiar with, in order correctly to understand and rightly to determine the issues involved.

Necessarily, five judges holding court in Washington and engaged constantly in the trial of such cases acquire a thorough knowledge of national legislation, national affairs, and the executive customs, practice, and course of business in all branches of the Government, which could not be expected of judges at a distance from the capital, who might occasionally have a case involving such matters.

Moreover, the trial of such cases before one court only insures uniformity of decisions, which is specially desirable as contributing to greater certainty in the administration of the law and greater security to all parties concerned.

Then, again, the whole business of defending the United States in suits at law, and in applications to Congress for special relief, is brought together in the Department of Justice, under the immediate and special supervision of the Attorney-General and within easy access to the records, documents, and evidence in all the other Departments. It is there systematized, thoroughly investigated, carefully attended to, and never neglected. The able assistants employed devote their entire time to this one class

of business, and thus become thoroughly conversant with all the ramifications of national litigation, and much better prepared for the defence of the United States than it would be possible for other counsel to become if the cases were distributed throughout the country, to be defended here and there by one of the sixty or seventy district attorneys, however able they may be.

By the act of June 25, 1868,[1] it was made the duty of the clerk to transmit to Congress, at the commencement of every December session, a full and complete statement of all the judgments rendered by the court for the previous year, stating the amount thereof and the parties in whose favor rendered, together with a brief synopsis of the nature of the claims upon which the judgments were rendered. This was merely for the information of Congress.

From these returns by the clerk the following table has been compiled, and it indicates the magnitude of the claims which the court has been called upon to investigate since 1867. As no such returns were made previous to that date, the amount of business transacted in the earlier years cannot be ascertained without considerable investigation, but it was no doubt about the same in proportion to that of subsequent years.

December term.	Aggregate claimed.	Aggregate recovered.
1867	$2,848,140 26	$810,628 38
1868	3,335,803 24	1,228,643 31
1869	6,073,163 55	953,597 27
1870	5,981,314 84	1,224,757 20
1871	3,716,724 69	2,354,852 18
1872	7,079,608 29	3,884,973 06
1873	6,274,157 41	2,418,510 85
1874	9,064,061 85	2,997,374 23
1875	6,065,513 53	1,138,678 58
1876	6,848,492 46	251,728 89
1877	3,622,624 34	256,267 31
1878	13,939,912 08	1,017,182 32
1879	1,681,732 80	331,332 86
1880	3,784,279 86	902,014 54
1881	4,241,011 39	854,354 50
1882	3,454,377 17	178,016 48
1883	3,017,721 82	468,998 13
1884	2,266,977 75	217,341 88
1885	3,614,783 96	339,603 36
	$97,210,401 29	$21,828,845 33

[1] Now Rev. Stat. § 1057.

This table includes only the amounts claimed and allowed in cases where judgments against the United States payable in money were the objects of the suits. It does not include the amounts claimed in cases under the Bowman act nor in cases against the District of Columbia.

Nor does it embrace those actions in which other remedies were prayed for, such as the cases of Hale, Rector, and others *vs.* United States, in which the parties claimed the whole of the Hot Springs Reservation, in Arkansas. The title to the Hot Springs had been in controversy and litigation for fifty years. It had been before the Supreme Court several times without reaching a result. There were five adverse parties, each claiming the property as against each other, while the United States asserted title to the whole as remaining in the government. The claimants also had been to Congress, and the General Land Office had been beseiged by them and their attorneys. In 1870 Congress passed the Hot Springs act, empowering the Court of Claims to sit as a court of equity and adjudicate the alleged titles both as between the government and the claimants and between the adverse claimants themselves. After a long trial and laborious investigation, the Court of Claims disposed of all the litigants by a single decree, and the Supreme Court affirmed the judgment. The value of the property involved in this controversy was reputed to be more than six million dollars.[1]

By the act of March 17, 1866,[2] the clerk was required to transmit a copy of the decisions of the court to the heads of departments; to the Solicitor, Comptrollers, and Auditors of the Treasury; to the Commissioners of the General Land Office and of Indian Affairs; to the chiefs of bureaus, and to other officers charged with adjusting claims against the United States, in order that the executive officers of the government might have the benefit of the judicial opinions and decisions of the court as precedents to guide them in other like cases.[3]

To carry into effect this provision in the manner most useful to those officers, and at the same time to afford persons dealing with the government, and others interested, the means of ascertaining the rules of law applicable to contracts and obligations

[1] 10 Ct. Cl. 289, 433; 11 *id.* 238; 92 U. S. 698.

[2] Now Rev. Stat. § 1057.

[3] Meigs' Case, 20 Ct. Cl. 181.

created by statute or otherwise on the part of the United States, and to present to Congress and the public the whole business and operations of the court whenever they should be sought for, Judge Nott, in connection with the clerk, commenced in the year 1867 the regular publication of reports, under the title of "Court of Claims Reports." This publication has ever since been continued annually, until it now numbers twenty volumes. Although published by government, these reports are also kept for sale by Mr. Wm. H. Morrison, the law bookseller of Washington, so that they may be had by persons interested who are not among the public officers to whom they are distributed by law.

Congress has always made ample provisions for the necessities and convenience of the court and of parties having business with it. The organic act made it the duty of the Speaker of the House of Representatives to appropriate such rooms in the Capitol at Washington for the use of the court as might be necessary for its accommodation, unless it should appear to the Speaker that such rooms could not be appropriated without interfering with the business of Congress; and in that event the court was authorized to procure in the city of Washington such rooms as might be necessary for the convenient transaction of its business.

In July, 1855, the court occupied the then Supreme Court room, now used for the Law Library of Congress, and remained there until the Supreme Court assembled in the autumn of that year, when it moved into the three rooms in the western projection of the main building of the Capitol. Thence it went into the six rooms in the west front of the basement of the north wing of the Capitol, then building, the roof not then having been put on. It was not until March 2, 1859, that any formal assignment, as contemplated by the act of Congress, was made, the unfinished condition of the work on the Capitol extension, then going on, having delayed it. On that day, James L. Orr, of South Carolina, Speaker of the House of Representatives, assigned to the court the rooms numbered 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49 and 50, in the basement of the western projection of the main building. These twelve rooms thus assigned were six front and six inner rooms. Two of those in front were made

into one for a court room, and it was occupied for that purpose until June, 1879. The wants of Congress for more room and greater convenience for committees having become apparent, the court surrendered at different times two of its front and two of its inner rooms. But in course of time more room was required to meet the increased and increasing necessities of Congress, and a provision was inserted in an act of July 1, 1879, making an appropriation for suitable and necessary rooms for the use and accommodation of the Court of Claims, which the Secretary of the Interior was authorized and directed to procure, and for arranging and furnishing as committee rooms for the use of the Senate and House the rooms in the Capitol occupied by the court.

In pursuance of this direction, the Secretary of the Interior provided the whole ground floor of the building on Pennsylvania avenue opposite the north front of the Treasury, all the upper stories of which had previously been occupied by the Department of Justice. Since then this building has been purchased by the United States, and is known as the Department of Justice Building. The premises are admirably adapted for the convenience of the court. There are six rooms, three on each side of the center wall. On one side is a room for attorneys, a large court-room, and the chambers of the court, or room for hearing motions and doing other chamber business. On the other side of the partition is the spacious clerk's office, in the rear the conference room of the judges, and an intermediate room, with safes for the preservation of the most important and valuable papers. These rooms were taken possession of by the court in November, 1879 [1]

The court has an excellent library of law books, which have been collected from time to time since its organization, and for the increase of which Congress appropriated twenty-five hundred dollars in June, 1880. Besides, the judges and attorneys practicing in the court have the benefit of the library of the Department of Justice, in the upper story of the same building.

The names of the Judges who have been appointed and held office are as follows:

John J. Gilchrist, of New Hampshire; appointed March 3,

[1] 14 Ct. Cl. 1.

1855; died April, 1858. At the time of his appointment he was holding the highest judicial office in his State, by a tenure of good behavior, terminable at the age of seventy years—that of chief justice of the Superior Court of Judicature—resigning to accept this position tendered him by President Pierce.

Isaac Blackford, of Indiana; appointed March 3, 1855; died December 31, 1859. He had been a judge of the Supreme Court of Indiana and reporter of its decisions for more than thirty-five years.

George P. Scarburgh, of Virginia; appointed May 8, 1855; resigned April, 1861. He was a lawyer of eminence in his State.

Edward G. Loring, of Massachusetts; appointed May 6, 1858; resigned in December, 1877, having passed the age of seventy years. Previous to his appointment he had been a judge in his State for many years.

James Hughes, of Indiana; appointed January 20, 1860, and resigned in February, 1865. He had been a circuit judge in his State, professor of law in the University of Indiana, and a member of Congress.

Joseph Casey, of Pennsylvania; appointed judge May 23, 1861, and on the reorganization of the court by which the number of the judges was increased to five, one of whom was to be the chief justice, he was appointed the first Chief Justice of the court, March 13, 1863. Resigned in November, 1870. He had been reporter of the Supreme Court of his State and a member of Congress.

David Wilmot, of Pennsylvania; appointed March 7, 1863, and died in office March, 1868. He had been a State Judge, and was for some time a Representative in Congress and a Senator of the United States.

Ebenezer Peck, of Illinois; appointed March 10, 1863, and, having passed the age of seventy years, he resigned in 1878. At the time of his appointment he was reporter of the Supreme Court of Illinois, and had held that position for sixteen years.

Charles C. Nott, of New York; appointed February 22, 1865. He had been engaged in the active practice of the law in the city of New York, where he was for several years Commissioner of Loans. Author of the standard work on Mechanics' Liens.

Samuel Milligan, of Tennessee; appointed July 25, 1868, and

died in office in April, 1874. He was a judge of the Supreme Court of Tennessee when called to this bench, and had previously been appointed by President Lincoln a judge of the United States Court for the Territory of Nebraska.

Charles D. Drake, of Missouri; appointed Chief Justice December 12, 1870, while representing the State of Missouri in the Senate of the United States, which position he resigned to accept the chief justiceship. He is the author of the well-known standard work on Attachment. Resigned January 12, 1885, in the seventy-fourth year of his age.

William A. Richardson, of Massachusetts; appointed judge June 2, 1874, Chief Justice January 20, 1885. He was judge of probate, and judge of probate and insolvency in his State, in all more than sixteen years; was one of the commissioners who revised the General Statutes of the State, A. D. 1860, and one of the commissioners to edit the same and the second edition of 1873; and one of the editors for twenty-two years of the annual statutes supplementary thereto. At the time of his appointment to this court he was Secretary of the Treasury of the United States. By authority of an act of Congress[1] he prepared and edited the Supplement to the Revised Statutes of the United States, A. D. 1881.

J. C. Bancroft Davis, of New York; appointed December 14, 1877. Besides the practice of the law in New York City he had been much in the service of the Government, having been secretary of legation at London; Assistant Secretary of State; secretary of the joint high commission which concluded the treaty of Washington; agent for the United States before the tribunal of arbitration, at Geneva, on the Alabama claims, and envoy extraordinary and minister plenipotentiary to the German Empire. Resigned December 9, 1881, to accept the office of First Assistant Secretary of State. Was re-appointed December 20, 1882. Resigned in November, 1883, upon being appointed Reporter of the Supreme Court of the United States.

William H. Hunt, of New Orleans, who had long been one of the leaders of the bar there, was appointed May 15, 1878, and resigned in March, 1881, on being appointed Secretary of the Navy in the cabinet of President Garfield.

[1] Act of June 7, 1880, 21 Stat. L. 308.

Glenni W. Scofield, of Pennsylvania; appointed May 20, 1881. He had been a judge in that State, and many years a Representative in Congress, and at the time of his appointment was Register of the Treasury of the United States.

Lawrence Weldon, of Illinois; appointed November 24, 1883. He had been twenty-five years in the extensive practice of the law, and had served as United States district attorney for the southern district of Illinois during the administration of President Lincoln and part of that of President Johnson.

John Davis, of the District of Columbia; appointed January 20, 1885. He had practiced law in New York City and in the District of Columbia, and was assistant counsel for the United States before the French-American Claims Commission. He had been in the diplomatic service of the United States in different positions and at the time of his appointment was First Assistant Secretary of State.

JURISDICTION.—The organic act of 1855 gave to the court jurisdiction to hear and determine "all claims founded upon any law of Congress or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress."[1]

That jurisdiction continues to the present time, except as it is affected by a statute of limitations inserted in the act of March 3, 1863,[2] by which it was provided that "every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues;" saving the right upon claims then already accrued to file the petition within three years after the passage of the act, and also the rights of certain persons under disability.

The consequence of this limitation is that claimants now go to Congress with their petitions for redress in matters of claims to which this exclusion from the Court of Claims applies, and in some special cases Congress has waived the statute in their behalf.

The same act of 1863 gave to the court jurisdiction of "all

[1] Now Rev. Stat. § 1059. [2] Now Rev. Stat. § 1069.

set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatever on the part of the government against any person making claims against the government in said court." Under this provision the United States have obtained judgment against individuals in several cases, and in certain railroad cases they have recovered more than a million of dollars.

By the act of May 9, 1866,[1] the jurisdiction was extended "to hear and determine the claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of losses, by capture or otherwise, while in the line of his duty, of government funds, vouchers, records, and papers in his charge, and for which such officer was and is held responsible;" with authority to enter a decree for his relief, to be certified to and allowed by the accounting officers of the Treasury as a credit whenever the court "ascertained the facts of any such loss to have been without fault or neglect on the part of any such officer."

The jurisdiction of the court was further extended by the act of June 25, 1868,[2] so as to authorize the head of any Executive Department, or the Secretary of the Treasury, on the certificate of any auditor or comptroller, to transmit to the court for hearing and adjudication any claim belonging to one of the classes of which the court might take jurisdiction, on the voluntary action of the claimant, "whenever the same involves disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount in controversy in the particular case; or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States."

It has been decided by the Supreme Court that the six years' limitation imposed by the statute in other cases does not apply in this court to cases thus referred, where the claimant had pre-

[1] Now Rev. Stat. § 1059.

[2] Now Rev. Stat. §1063.

sented his claim to the Department within six years after it had accrued.[1]

Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, have the privilege of prosecuting claims against the United States in the Court of Claims, whereof the court, by reason of their subject-matter and character, might take jurisdiction. It has been judicially determined by decisions already made, that under this provision the right to sue in this court is accorded to citizens of Prussia, Hanover, Bavaria, Switzerland, the Netherlands, the Hanseatic Provinces, the free city of Hamburg, Spain, Belgium, Italy and Great Britain, and it no doubt belongs to the citizens of other countries.

The jurisdiction of the court is restricted as to certain claims for or in respect to which the claimants have pending in other courts suits against persons who at the time the causes of action occurred were acting, or professing to act, under the authority of the United States, and certain claims growing out of treaties.

These provisions confer the general, continuing, and permanent jurisdiction of the court. They may be found, with their incidental regulations and details, in chapter 21 of the Revised Statutes of the United States, §§ 1059–1093.

But Congress has, from time to time, given to the court jurisdiction, for a limited period, in particular classes of cases, and has, by special acts, referred many single claims to the court for adjudication.

By the act of March 12, 1863,[2] entitled "An act to provide for the collection of abandoned and captured property, and for the prevention of frauds in insurrectionary districts within the United States," the Secretary of the Treasury was authorized to appoint agents to receive and collect all abandoned or captured property in any state or territory, or any portion of any state or territory of the United States designated as insurrectionary against the lawful government of the United States by proclamation of the President of July 1, 1862. The property collected was required

[1] Lippitt's Case, 100 U. S. 663, and Green's Case, 18 Ct. Cl. 93.

[2] 12 Stat. L. 820.

to be appropriated to public use, or sold, and the proceeds paid into the Treasury of the United States.

The third section of the act provides that "any person claiming to have been the owner of any such abandoned or captured property, may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof, in the Court of Claims, and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

It was decided by the Supreme Court that, in accordance with the President's proclamation, the suppression of the rebellion must be recognized as having taken effect on the 2d of April, 1866, in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas, and on the 20th of August, 1866, "throughout the whole of the United States." The right to file petitions under this act therefore expired on the 20th of August, 1868.

The Supreme Court decided, in 1871, that the President's proclamation of December 25, 1868, granting "unconditionally and without reservation to all and every person who directly or indirectly participated in the late insurrection or rebellion a full pardon and amnesty for the offence of treason against the United States, etc., with restoration of all rights, privileges, and immunities under the Constitution and laws which have been made in pursuance thereof," enabled claimants under this act to recover in the Court of Claims without proof or allegation in their petitions that they never gave aid or comfort to the rebellion.[1]

This decision having been made after the time for bringing actions allowed by the act, it came too late for those who had previously been deterred from presenting their petitions by reason of their participation in the rebellion.

The court has disposed of all the cases filed under this act, though many of them were dismissed because presented after the

[1] Armstrong & Pargoud's Cases, 7 Ct. Cl. 280, 289, and 13 Wall. 154, 156.

time limited in the act had expired. The whole number of cases was 1578, and the whole amount demanded, according to the petitions, was $77,585,962.10. The amount actually recovered by the claimants and paid out of the Treasury on judgments rendered was $9,833,423.16. The balance of money arising from captured and abandoned property still in the Treasury is $10,512,007.96.[1]

By the act of June 16, 1880, Congress gave to this court jurisdiction of certain claims against the District of Columbia, limiting parties to six months from the passage of the act in which to file their petitions. Under this authority 394 cases have been instituted, all of which but 39 have been disposed of. The amount claimed in all the cases was about six and a half million dollars, and the amount recovered by claimants is about $400,000. The District has had judgment in its favor in many cases upon set-off and counter-claims.

In 1873, by special act, Congress granted jurisdiction to the Court of Claims to hear and determine the case of the city of Carondelet, brought to recover against the United States the value of a tract of land of about 1700 acres, formerly a military reservation, and near which had grown up the settlement, village, and city of Carondelet, subsequently merged in the city of Saint Louis. The court held that the title was in the United States, and its decision was affirmed by the Supreme Court on appeal.[2]

Several cases have been referred to the court by Congress in which the owners of vessels claimed damages on account of collisions with vessels of the navy of the United States, occurring, as alleged, by reason of the fault and negligence of the naval officers in command of the latter.

In 1873, and previously, there arose a controversy between the United States and the Pacific railroad companies as to the right of the former to withhold payment for freight and transportation for the government until those companies had reimbursed the United States for interest paid on the bonds issued for the aid and benefit of the companies, which were made payable in thirty years; the companies claiming that the interest paid by the United States was not to be reimbursed until the maturity of the bonds. There were some other questions also involved.

[1] Hodges' Case, 18 Ct. Cl. 700.

[2] 9 Ct. Cl. 456; 11 *id.* 367; 92 U. S. 462.

A section in the appropriation act of March 3, 1873, provided that the Secretary of the Treasury should withhold all payments to said companies, but giving the companies the right to bring suit in the Court of Claims therefor. Actions were brought, and were prosecuted and defended with great ability; the Attorney-General himself appearing for the government, and Mr. Sidney Bartlett, of Boston, and Mr. E. W. Stoughton, of New York, for the claimants. In the first or leading case judgment was rendered for the claimants, and on appeal to the Supreme Court the rulings of the Court of Claims were affirmed. In a subsequent case some changes were made by the Supreme Court in the method of computing the amount allowed.

Other cases have since been tried between the government and the railroad companies, with equally distinguished counsel, and judgments have been rendered for several million dollars. In the latest case, the court awarded to the United States on counter-claims $4,487,807.39, and to the company on its demand $2,910,-124.08, and gave judgment in favor of the government for the difference, $1,577,683 31.

Many questions of law and fact of much intricacy and great difficulty were involved in these controversies.

So in 1874 and 1875 Congress prohibited the payment of any money from the public Treasury for the transportation of any property or troops of the United States, or of any officers of the army traveling under military orders, over any railroad which, in whole or part, was constructed by the aid of a grant of public land on condition that such railroad should be a public highway for the use of the government free of toll or other charge, or upon any other conditions for the use of such road for such transportation, reserving the right to the companies to bring suit in the Court of Claims, and recovering for the same if found entitled thereto by virtue of the laws in force prior to the passage of the act of prohibition, and waiving the statute of limitations. In pursuance of this provision suits were brought, and the rights of the United States and of the railroad companies under the land-grant acts were adjudicated and settled, and Congress was relieved from further trouble in the matter.

For many years there was pending in Congress a claim of the trustees of Albert G. Sloo for carrying the mail between New

York and Chagres and New Orleans and Chagres, in addition to the regular service required under a contract made in 1847. "Application was persistently made," say the Supreme Court, "to Congress for an equitable allowance," but for some reason or other the subject was always postponed or delayed, until finally, on the 14th of July, 1870, Congress passed an act "referring the case to the Court of Claims." The case involved the rights of the parties and the liabilities of the government growing out of correspondence with the Postmaster-General at the time the service was performed, and the amount in controversy was more than a million dollars. The case was tried before four judges of the Court of Claims, and they were equally divided upon the question of the liability of the United States. A *pro forma* judgment was entered for the defendants, and the case was taken to the Supreme Court on appeal. A majority of that court held the United States liable, and a mandate was issued accordingly and judgment entered thereon for the claimants for $1,031,000, three judges of the Supreme Court dissenting.

By the act of June 19, 1878, Congress authorized any persons or body corporate holding or making any claim upon the balance of the fund usually designated and known as "the Chinese indemnity fund," under the control of the Department of State of the United States, for loss sustained by the plunder and destruction, in the year 1854, of the bark Caldera, and property on board of said vessel, at any time within twelve months after the passage of the act to commence proceedings in the Court of Claims, and conferred jurisdiction on the court to hear and determine such claims "according to principles of justice and international law." Suits were brought and thoroughly and exhaustively tried by able counsel. The Court of Claims gave judgment for the claimants, two of the five judges dissenting. On appeal, the judges of the Supreme Court were equally divided in opinion, and the judgment was affirmed for that reason.

In this connection it may be mentioned that another case of an earlier date, La Peyre *v.* The United States, even more singularly divided the two courts. The question involved was the novel one, whether a proclamation of the Executive takes effect from the day of its date or from the time of its promulgation. In the Court of Claims the point was argued before four judges,

a reargument was ordered, and the court then stood equally divided, judgment *pro forma* being given against the claimant. In the Supreme Court the point was again argued, a reargument was likewise ordered, and the court then stood five for reversal and four for affirmance, with one of the majority merely concurring in the judgment.

On the 3d of March, 1881, Congress passed an act which authorized the Court of Claims to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation and to render judgment thereon, with power to review the entire question of differences *de novo*, without being estopped by any action had or award made by the Senate of the United States in pursuance of the treaty of 1855. These "questions of difference" grew out of treaties made in 1820, 1825, 1830, 1855, and 1856. They had been in controversy in Congress and the Departments for many years, and involved a claim of more than fifteen millions of dollars. Suit has been instituted, and the printed record of the case covers more than three thousand printed pages. It has not yet been brought to a termination.

By act of March 3, 1883, Congress authorized the Eastern band of Cherokee Indians to bring a suit in equity against the United States, as trustees, and the Cherokee Nation, to determine the claim of the former to a share of certain funds held in trust for the Cherokees. The case involved the construction of numerous treaties and statutes, and made necessary a careful examination of the whole history of the Cherokee Indians since 1783. After a long trial the case was disposed of by a decree in favor of the Cherokee Nation.[1]

Numerous other important cases specially referred to the court might be cited, but a sufficient number has been mentioned to convey a correct idea of its jurisdiction, and to show the magnitude and intricacies of its business, as well as the relief which is afforded to Congress by removing such controversies from the halls of legislation.

The referring of peculiar cases to the court by special acts of Congress seems to be on the increase at each succeeding session.

The most recent act is that of January 20, 1885, referring the

[1] Eastern Band of Cherokee Indians *v.* The United States *et al.*, 20 Ct. Cl. 449.

French Spoliation Claims, "arising out of illegal captures, detentions, seizures, condemnations, and confiscations, prior to the ratification of the convention between the United States and the French Republic concluded on the thirtieth of September, eighteen hundred." The time for presenting such claims is limited to two years from the passage of the act. The court is to find the facts and the law in each case and report the same to Congress.[1]

PRACTICE.—All cases are tried in the Court of Claims with the same formalities as are cases between individual litigants in the courts of common law as to the admissibility of evidence, the examination and cross-examination of witnesses, and the application of legal principles, and the rights of the United States and of claimants are guarded and protected by the established rules of law as administered in other courts.

The procedure and practice have been improved and simplified by Congressional enactments, and by the rules adopted by the court from time to time, as suggested in the course of its experience of more than thirty years, until a system has grown up and become established of the utmost convenience to parties and counsel, wherever they may reside.

Claimants must file petitions properly setting out their cases, and must prove their claims by competent evidence. But as the court is held at Washington, and has jurisdiction of cases which arise in distant and different parts of the country, Congress has provided that "the testimony shall be taken in the county where the witness resides, when the same can conveniently be done."[2]

When, therefore, a claimant had filed his petition, which he may do by sending it to the clerk of the court by mail or otherwise, he may, at his leisure and convenience, go on taking the depositions of witnesses whenever and wherever he can find them, first giving notice to the Attorney-General that he may be present himself, or by an assistant, to cross-examine them.

The court is authorized by law to call upon any of the Departments for any information or papers it may deem necessary, and it always does so in proper cases on motion of claimants; and thus they can readily obtain whatever information and evidence

[1] 23 Stat L. 283. [2] Rev. Stat. § 1081.

affecting the issues involved are contained in the archives of the government.[1]

Parties filing petitions, pleadings, and motions, except motions for calls on the Departments, are required by the rules to leave with the clerk at the same time written notice thereof, addressed to the attorney of the adverse party, with postpage prepaid, and the clerk is required to mail the same, and to note the fact on the general docket; and all notices may be served in the same manner. Printed blanks are furnished to parties for this purpose. Upon the receipt by the clerk of an answer to a call upon a Department, he is required also to notify the claimant's counsel and Attorney-General of the fact by mail. By these rules, attorneys in any place, however distant from Washington, are informed at once, and therefore always know of every paper filed in their cases without being obliged to watch the state of the clerk's docket.

When the claimant has closed his proof, he may give notice to the Attorney-General to that effect by an entry in the notice book, in the clerk's office. In two months thereafter, unless the Attorney-General asks for further time, the claimant may have his case placed on the trial list.

Before a case is placed on the trial list, however, the claimant must file in the clerk's office twenty-five printed copies of his brief and his proposed findings of fact, and the Attorney-General has one month thereafter in which to file a brief and request for findings of fact on his part.

If counsel live at a distance, the court will, on application, assign a certain day for the hearing of his case, so that he need not be detained, as he may be in other courts, awaiting his turn; or he may file his request for findings of facts, briefs and argument, by forwarding them to the clerk by mail, and thus he may be relieved from going to Washington at all during the progress of the case, from beginning to end of the proceedings.

No fees or costs are taxed or allowed by the court, and if the claimant loses his case he is not subjected to a bill of costs, except that a statute requires the losing party to pay the cost of printing the records.[2] Of course, a party must pay for the taking of the

[1] Rev. Stat. § 1076.

[2] Act of March 31, 1877. Supplement to Rev. Stat. 288, and 18 Stat. L. 344.

depositions which he himself requires in establishing his claims, but if defeated he is not required to pay for taking the depositions of his adversary.

The evidence is printed at the Government Printing Office, and that and all other documents in each case are made into records for the use of the court and the parties.

The court has no jury. All questions of law and of fact are submitted to the five judges, and each judge reads over the whole record, so that there is not the same necessity for oral arguments as in the common law courts.

There is a provision still standing in the Revised Statutes,[1] in terms applying to all cases in the court, requiring claimants to set forth in their petitions, and to prove affirmatively, that they have at all times borne true faith and allegiance to the government, and have not voluntarily aided, abetted or given encouragement to rebellion. Since the decision of the Supreme Court in relation to a similar clause in the captured and abandoned property act, which has been hereinbefore referred to, declaring the constitutional effect of the proclamation of general pardon and amnesty issued by the President in December, 1868, to be the relief of all persons from such a restriction upon their rights, the practice has been not to require an allegation of loyalty in the petition or proof of it at the trial.[2]

But this relief does not apply to cases in which loyalty is required to be proved under section 4 of the Bowman act.

The defence of all claims is confided by law to the Attorney-General, who assigns one of the Assistant Attorneys-General, with an adequate number of assistants, to that special duty, under his own supervision, but he occasionally makes the argument himself in cases of unusual importance and magnitude. The rights and interests of the United States are therefore ably and amply protected. Indeed, in two particulars the United States are greatly favored in their defences by provisions of law which do not apply in any other courts. No claimant, nor any persons from or through whom any such claimant derives his alleged title, claim or right, nor any person interested in any such title, claim or right, is a competent witness in supporting the same, while

[1] Rev. Stat § 1072.

[2] Armstrong and Pargoud Cases, 156. 7 Ct. Cl. 280, 289; 13 Wall. 154,

all such persons may be witnesses to defeat them. Cases against the District of Columbia and some cases specially referred to the court are expressly exempted by law from this provision.

At any time within two years next after the final disposition of any claim, on motion made in behalf of the United States, the court may grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; and this may be done while an appeal is pending in the Supreme Court, or after the judgment has been affirmed by that court, or even after it has been paid at the Treasury. But new trials on motion of claimants can only be granted for the same reasons which, by the rules of common law or chancery, in suits between individuals, would furnish sufficient ground for new trials, and every such motion must be made at the term in which judgment is rendered and before the commencement of the summer vacation.

Moreover, it is expressly provided by statute that any person who corruptly practices or attempts to practice any fraud against the United States, in the proof, statement, establishment, or allowance of any claim, or any part of any claim, shall *ipso facto*, forfeit the same to the government; and it is made the duty of the court, in such cases, to find specifically that such fraud was practiced or attempted, and to give judgment that the claim is forfeited, and that the claimant be forever barred from presecuting the same.

The first appeal case which went to the Supreme Court was sent up with a full copy of the whole record, evidence and all, just as all cases had been previously reported to Congress under the former law. But that case was dismissed for want of jurisdiction in that court to hear appeals from the Court of Claims, by reason of the section which gave a revisory power to the Secretary of the Treasury to review its judgments, as has been already stated. When that section was repealed, and the Supreme Court sustained the appellate jurisdiction conferred by other provisions of the act, they foresaw that with the whole records sent up they would encounter the same difficulty which Congress had experienced—the utter impossibility of devoting sufficient time to the consideration of such a mass of evidence, and of under-

taking to review the findings of fact thereon. Therefore, in the year 1866, under the act of March 3, 1863, they wisely made rules requiring the Court of Claims to find the facts, and confining the hearing on appeal to the questions of law raised thereon. These rules, as subsequently modified, now stand as follows:

"In all cases hereafter decided in the Court of Claims, in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

"1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

"2. A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as part of the record.

"3. In all cases an order of allowance of appeal by the Court of Claims, or the Chief Justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

"4. In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of facts and their conclusions of law therein, in open court, before or at the time they enter judgment in the case.

"5. In every such case, each party, at such time before trial and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact."

The practice now is for the Court of Claims, after hearing or reading, as the case may be, the arguments of counsel on both sides, and after each judge has thoroughly read over the whole

record by himself, and considered the requests of the opposite parties, to draw up findings of fact.[1] It is easy to see that the duties of the judges in this respect, and in coming to an agreement on each one of the facts which are considered material, often very numerous, as well as in reducing to concise written statements the facts agreed upon by them, are laborious, difficult and perplexing. But all that has to be done, and is done. Upon the findings of fact thus drawn up the court applies the law, delivers opinions, and enters judgments in accordance therewith. The concurrence of three judges is made necessary by statute to the rendition of any judgment.

If judgment is against a claimant in any case where the amount in controversy exceeds three thousand dollars, he may, within ninety days thereafter, appeal to the Supreme Court on the law. The United States may appeal in like manner from any judgment adverse to the government, without reference to the amount in controversy. Before the passage of the Revised Statutes the United States could not appeal in cases involving less than three thousand dollars, unless the Chief Justice certified that the judgment or decree would affect a class of cases, or furnish a precedent for the future action of an executive department of the government in the adjustment of such class of cases, or a constitutional question. But this restriction on the right of appeal by the defendants was omitted from the Revised Statutes, apparently by mistake, and since then several appeals have been taken on the part of the United States in cases involving small amounts, without such certificate, although probably they did, in fact, belong to a class of cases pending in the departments.

There are other provisions in the law and the rules of the court in relation to the details of practice, which do not require particular mention here.

Printed copies of the Rules, as well as of the laws of Congress relating to the court, may be had by members of the bar of the court, on application to the clerk, and from them all necessary information may be obtained as to instituting and conducting suits against the United States.

Conclusion.—In bringing this article to a close, the following remarks in relation to the court made by the late Hon.

[1] Union Pacific Railway Motion, 20 Ct. Cl. 200.

Charles O'Conor, the well-known and eminent lawyer of New York, in an argument reported in full in a volume recently published by Baker, Voorhis & Co., of New York City, entitled "Great Speeches by Great Lawyers," seem peculiarly appropriate:

"The court itself is the first-born of a new judicial era. As a judicial tribunal, it is not only new in the instance; it is also new in principle. So far as concerns the power of courts to afford redress, it has heretofore been fundamental that the sovereign can do no wrong. This court was erected as a practical negative upon that vicious maxim. Henceforth our Government repudiates the arrogant assumption, and consents to meet at the bar of enlightened justice every rightful claimant, how lowly soever his condition may be.

"Prior to the institution of this court, all rights as against the nation were imperfect in the legal sense of the term; every duty of the nation was a duty of imperfect obligation. There was no judicial power capable of declaring either; no private person possessed the means of enforcing the one or coercing the other. But effectual progress has been made towards giving form and method to the administration of justice between the nation and the individual. This court enables the latter to obtain an authoritative recognition of his rights. No more is needed; for in no case can a state, after such a recognition, withhold payment and yet retain its place in the great family of civilized nations.

"The ordinary jurisdiction of the court bears a strong resemblance to the narrow cognizance at common law; but its extraordinary jurisdiction over all claims which may be referred to it by either house of Congress extends its power to the utmost limits attainable by juridical science in its fullest development. In this aspect, its dignity and importance as a governmental institution cannot be too highly appreciated. As a means by which rightful claims against the government may be readily established, and those not founded in justice promptly driven from the portals of Congress, it must exercise a most healthful influence.

"But we are authorized to look higher than the mere convenience of suitors and the dispatch of public business. En-

lightened patriotism will contemplate other and more important consequences. Caprice can no longer control. Here equity, morality, honor, and good conscience must be practically applied to the determination of claims, and the actual authority of these principles over governmental action ascertained, declared, and illustrated in permanent and abiding forms. As step by step, in successive decisions, you shall have ascertained the duties of government toward the citizen, fixed their precise limits upon sound principles, and armed the claimant with means of securing their enforcement, a code will grow up giving effect to many rights not heretofore practically acknowledged.

"In it will be found enshrined for the admiration of succeeding ages an honorable portraiture of our national morality, and a full vindication of the eulogium recently pronounced upon our people by the highest authority in the parent state. 'Jurisprudence,' says Lord Campbell, in the Queen *v.* Millis, 'is the department of human knowledge to which our brothers in the United States of America have chiefly devoted themselves, and in which they have chiefly excelled.'"

CHAPTER XVII.

COURTS OF THE DISTRICT OF COLUMBIA—TERRITORIAL COURTS—THE INTERSTATE COMMERCE COMMISSION.

The Supreme Court of the District of Columbia.

§ 441. It is hardly within the scope of the present volume to treat at large questions of jurisdiction of and procedure in courts that are purely local. Owing to the importance of some of these courts, however, it is necessary that some notice should be taken of them.[1]

The provisions of the Revised Statutes relating to the District of Columbia and of subsequent statutes with reference to the organization, terms and jurisdiction of the Supreme Court of the District are as follows:

SEC. 750. There shall be a Supreme Court of the District, which shall consist of a chief justice and four associate justices, who shall severally be appointed by the President, by and with the advice and consent of the Senate, and shall hold their offices during good behavior. By the act of February 25, 1879,[2] there shall be appointed by the President, by and with the consent of the Senate, one additional associate justice of the Supreme Court of the District of Columbia. The said additional associate justice shall have the same power, authority and jurisdiction as now or hereafter may be exercised by any of the associate justices of the said Supreme Court, and shall be entitled to receive the same salary, payable in the same manner.

SEC. 751, as amended by the act of February 9, 1893.[3] The justices of the Supreme Court of the District of Columbia shall

[1] For a full discussion of the practice and procedure of the Supreme Court of the District of Columbia, the reader is referred to Mr. Franklin H. Mackey's work on that subject.

[2] Act of Feb. 25, 1879, ch. 99, § 1, 20 Stat. L. 320.

[3] Act of Feb. 9, 1893, ch. 74, § 14, 27 Stat. L. 434.

hereafter receive an annual salary of five thousand dollars each, payable quarterly at the Treasury of the United States.

SEC. 752. Each justice, before he enters upon the duties of his office, shall take the oath prescribed to be taken by judges of the courts of the United States.

Sec. 753. The several general terms and special terms of the circuit courts, district courts and criminal courts authorized by law, are declared to be, severally, terms of the Supreme Court of the District of Columbia; and the judgments, decrees, sentences, orders, proceedings and acts of the general terms, special terms, circuit courts, district courts, and criminal courts rendered, made or had, are and shall be deemed judgments, decrees, sentences, proceedings and acts of the Supreme Court; but nothing contained in this section shall affect the right of appeal as provided by law.

By the act of June 23, 1874,[1] the justice of the Supreme Court of the District of Columbia, holding a criminal term for said District, may, when not engaged in the proper business of the criminal term, hold sittings of the circuit court, and employ the petit juries drawn for the criminal term in the trial of such cases depending in said circuit court as the justice presiding therein may assign to him for that purpose; and the business done at such sittings shall be recorded in the minutes of the circuit court.

By the act of June 8, 1880,[2] any justice of the Supreme Court of the District of Columbia, holding a term of the circuit court for said District (whenever the condition of the business in such circuit court and in the criminal court, in the opinion of the general term of said Supreme Court, may render it proper and expedient so to do), may hold sittings for the trial of such criminal cases depending in the criminal court as the justice presiding therein may assign for that purpose, and may employ the petit juries drawn for such circuit court for such trials; and such sittings may be held during the regular sessions of the criminal court or, in the recess thereof, during the term of such circuit court; and the business done at such sittings shall be recorded in the minutes of the criminal court. By the act of March 3,

[1] Act of June 23, 1874, ch. 454, 18 Stat. L. 204.

[2] Act of June 8, 1880, ch. 137, § 1, 21 Stat. L. 166.

1893,[1] hereafter the general term of the Supreme Court of the District of Columbia may order two terms of the criminal court to be held at the same time, whenever in their judgment business requires it; and they shall designate the time and place of holding the same, and the justices by whom such terms shall respectively be held, and shall make orders for a division of the criminal docket between the judges holding such terms.

SEC. 754, as amended by the act of February 27, 1877.[2] Any three of the justices of the Supreme Court may hold a general term, and any one of them may hold a special term. Whenever at a general term, held by four justices, the court shall be equally divided, such divisions shall be noted on the minutes; and within four days either party may file with the clerk a motion to have the cause re-argued before five justices; and such re-argument shall be as soon as conveniently may be.

By the act of February 25, 1879,[3] two of the justices, sitting at general term, shall constitute a quorum for the transaction of business; but when the two justices shall be divided in opinion, the same shall be noted upon the minutes of the court, and thereupon and within four days thereafter either party in such cause may file with the clerk of the court a motion in writing to have such cause re-argued before three or more justices; but no justice shall sit in general term to hear an appeal from any judgment or decree or order which he may have rendered at the special term.

SEC. 755, as amended by the act of March 1, 1889.[4] The Supreme Court in general term shall have power by rule of court to regulate the period of holding its terms, as also the periods of all the special terms, and to fix the number of such terms, and to alter the same from time to time as public convenience may require.

SEC. 756. At least three terms of the Supreme Court shall be held annually.

SEC. 757. The special terms shall be held by one of the justices of the Supreme Court at such time as the court in general term shall appoint.

[1] Act of March 3, 1893, ch. 208, par. 20, 27 Stat. L. 572, etc.

[2] Act of Feb. 27, 1877, ch. 69, § 2, par. 10, 19 Stat. L. 240.

[3] Act of Feb. 25, 1879, ch. 99, § 2, 20 Stat. L. 320.

[4] Act of March 1, 1889, ch. 308, § 2, 25 Stat. L. 749.

SEC. 758. Repealed.

SEC. 759. Repealed.

SEC. 760. The Supreme Court shall possess the same powers and exercise the same jurisdiction as the circuit courts of the United States.

SEC. 761. The justices of the Supreme Court shall severally possess the powers and exercise the jurisdiction possessed and exercised by the judges of the circuit courts.

SEC. 762. Any one of the justices may hold a special term, with the same powers and jurisdiction possessed and exercised by district courts of the United States.

SEC. 763, as amended by the act of February 27, 1877.[1] Said courts shall have cognizance of all crimes and offences committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district, and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States; and any one of the justices may hold a criminal court for the trial of all crimes and offences arising within the district.

By the act of June 22, 1874,[2] the criminal court of the District of Columbia shall have jurisdiction of all crimes and misdemeanors committed in said District, not lawfully triable in any other court, and which are required by law to be prosecuted by indictment or information.

SEC. 764, as amended by the act of February 27, 1877.[3] The Supreme Court has jurisdiction of actions, suits, controversies and cases, as well in equity as at law, arising under the copyright and patent laws, and for damages for the infringement of any patent, by action on the case, in accordance with the provisions of sections 4919–4921, of chapter one, title lx. of the Revised Statutes of the United States, "Patents, Trade-marks, and Copyrights."

SEC. 765 relates to the bankrupt law, since repealed.

[1] Act of Feb. 27, 1877, ch. 69, § 2, par. 11, 19 Stat. L. 240.

[2] Act of June 22, 1874, ch. 396, § 1, 18 Stat. L. 193.

[3] Act of Feb. 27, 1877, ch. 69, § 2, par. 12, 19 Stat. L. 240.

SEC. 766. The Supreme Court shall have jurisdiction of all applications for divorce.

SEC. 767. No action or suit shall be brought in the Supreme Court by original process against any person who shall not be an inhabitant of, or found within, the District, except as otherwise specially provided.

SEC. 768. The Supreme Court has power to proceed in all common law and chancery causes instituted before it, in which either of the parties reside without the District, in the same way that non-residents were proceeded against in the general court or in the Supreme Court of Chancery in the State of Maryland on the third day of May, 1802.

SEC. 769. The justices of the Supreme Court shall not hold original plea of any debt or damage in cases within the jurisdiction given to justices of the peace, which shall not exceed fifty dollars, exclusive of costs.

By the act of Feb. 19, 1895,[1] the jurisdiction of justices of the peace of the District of Columbia shall be exclusive of original jurisdiction where the amount claimed to be due or the value of the property sought to be recovered shall not exceed one hundred dollars, and original and concurrent with the Supreme Court of the District of Columbia where the amount claimed to be due or the value of the property sought to be recovered is more than one hundred dollars, but does not exceed three hundred dollars.

SEC. 770. The Supreme Court, in general term, shall adopt such rules as it may think proper to regulate the time and manner of making appeals from the special term to the general term, and may prescribe the terms and conditions upon which such appeals may be made, and may also establish such other rules as it may deem necessary for regulating the practice of the court, and from time to time revise and alter such rules. It may also determine by rule what motions shall be heard at a special term, as non-enumerated motions, and what motions shall be heard at a general term in the first instance.

SEC. 771. All official oaths required by law to be taken by officers of the United States may, in the District, be administered and certified by any one of the justices of the Supreme Court of the District.

[1] Act of Feb. 19, 1895, ch. 100, § 2, 28 Stat. L. 668.

SECS. 772–780 deal with the appellate jurisdiction of the Supreme Court.

By the act of February 9, 1893,[1] the appellate power and jurisdiction of the general term of the Supreme Court is abrogated and abolished, and no causes shall hereafter be heard in the said general term. Such jurisdiction is conferred on the Court of Appeals created by the act. The act of March 2, 1893,[2] conferred on the Supreme Court in general term appellate jurisdiction over final orders or decrees of said court in special term in highway proceedings regulated by the act.[3] This section was amended, however, by the act of January 21, 1896,[4] conferring such appellate jurisdiction on the Court of Appeals.

The Supreme Court of the District is a court of the United States, and its judgment, when suit is brought thereon in any state, is conclusive upon the defendant, except for such cause as would be sufficient to set it aside in the courts of the District.[5] But whether an act of Congress using the words "court of the United States" applies to it as well as to the circuit courts, is a question of intention.[6] Section 725 of the Revised Statutes of the United States giving the courts of the United States power to punish for contempt of court by fine and imprisonment applies to this court.[7] The court has no power to admit a will or codicil to probate as a devise of real estate.[8] Nor to grant letters of ancillary administration unless there be local assets within the District; and a claim against the United States which may be prosecuted in the Court of Claims is not such a local asset.[9] The court has jurisdiction to pass an order requiring payment of alimony and to enforce it by committing the party to jail, if he refuses to obey it.[10]

[1] Act of Feb. 9, 1893, ch. 74, § 7, 27 Stat. L. 434.

[2] Act of March 2, 1893, ch. 197, § 17, 27 Stat. L. 532, etc.

[3] This act was held constitutional in Bauman *v.* Ross, 167 U. S. 548.

[4] Act of Jan. 21, 1896, ch. 5, Stat. 1895–96, 2.

[5] Embry *v.* Palmer, 107 U. S. 3.

[6] *Ex parte* Norvell, 20 D. C. 348.

[7] Hovey *v.* Elliott, 145 N. Y. 126.

[8] Campbell *v.* Porter, 162 U. S. 478.

[9] Rutherford *v.* U. S., 27 Ct. Cl. 539.

[10] Tolman *v.* Leonard, 6 App. D. C. 224. As to depositions in the District in suits pending elsewhere, see Rev. Stat. of U. S., §§ 871–874.

Inferior Courts of the District.

§ 442. It has already been stated that justices of the Supreme Court of the District may hold criminal courts under certain regulations. It is provided by the Revised Statutes relating to the District that there shall be a police court consisting of one judge learned in the law, who shall be appointed by the President, by and with the advice and consent of the Senate, for the term of six years, at a salary of three thousand dollars per annum.[1] By the act of March 3, 1891,[2] the President is authorized to appoint an additional judge at the same salary and with the same powers. The business of the court may be carried on by each of the judges sitting separately and simultaneously. They are to hold separate sessions, and are empowered to make rules for the apportionment of business.

By section 1 of the above act, the police court shall have original jurisdiction concurrently with the Supreme Court of the District of all crimes and offences hereafter committed against the United States, not capital or otherwise infamous, and not punishable by imprisonment in a penitentiary, committed within the District, except libel, conspiracy and violations of the post-office and pension laws of the United States; and also of all offences hereafter committed against the laws, ordinances and regulations of the District, and shall have power to examine and commit or hold to bail, either for trial or further examination, in all cases whether cognizable therein or in the Supreme Court of the District. By the act of July 23, 1892,[3] prosecutions in the police court shall be on information by the proper prosecuting officer. In all prosecutions within the jurisdiction of the court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court expressly waive such trial, and request to be tried by the judge, in which case the trial shall be by such judge and the judgment and sentence shall have the same force and effect in all respects as if the same had

[1] Rev. Stat. D. C., §§ 1041–1042. See, with regard to the jurisdiction of this court, Ransdell *v.* Patterson, 1 App. D. C. 165; Gassenheimer *v.* Dist. of Col., 6 *id.* 108.

[2] Act of March 3, 1891, ch. 536, § 6, 26 Stat. L. 848, etc.

[3] Act of July 23, 1892, ch. 236, § 1, 27 Stat. L. 261.

been entered and pronounced upon the verdict of a jury. In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last named cases wherein the fine or penalty may be fifty dollars or more, or imprisonment as punishment for the offence may be thirty days or more, the accused shall demand a trial by jury, in which case the trial shall be by jury. In all cases where the court shall impose a fine it may, in default of the payment of the fine imposed, commit the defendant for such a term as it thinks right and proper, not to exceed one year.

By the act of March 2, 1897, exceptions and writs of error in this court are regulated.[1]

There are other minor statutory regulations with regard to this court which it is not our purpose here to consider. The provisions of chapter thirty-one of the Revised Statutes relating to the District of Columbia have been considerably modified by later statutes affecting the appointment and powers of justices of the peace. By the act of June 7, 1878,[2] the President shall nominate and, by and with the advice and consent of the Senate, appoint fifteen justices of the peace within and for the District of Columbia. Said justices shall be assigned as follows: two in the city of Georgetown, one in Tennallytown, one in Brightwood, one in Uniontown and ten in the city of Washington. Their term of office shall be four years, subject to removal for cause.

By the act of February 19, 1895,[3] these justices shall have jurisdiction to hear, try and determine all civil pleas and actions, including attachment and replevin, when the amount claimed to be due or the value of the property sought to be recovered shall not exceed three hundred dollars, except in cases where the title to real estate is in issue, actions for malicious prosecution, actions against justices of the peace or other officers for misconduct in office, and actions for slander, verbal or written, and actions for damages for breaches of promise to marry. Such jurisdiction shall be exclusive original jurisdiction where the

[1] Act of March 2, 1897, ch. 360, 29 Stat. L. 607, amending § 4 of the act of March 3, 1891, ch. 536.

[2] Act of June 7, 1878, ch. 162, § 1, 20 Stat. L. 100.

[3] Act of Feb. 19, 1895, ch. 100, §§ 1–3, 28 Stat. L. 668.

amount claimed to be due or the value of the property sought to be recovered shall not exceed one hundred dollars, and original and concurrent with the Supreme Court of the District where the amount claimed to be due or the value of the property sought to be recovered is more than one hundred dollars, but does not exceed three hundred dollars; and where the sum claimed exceeds twenty dollars either party shall be entitled to a trial by jury. No appeal shall be allowed from the judgment of a justice of the peace in any common law action unless the matter in demand in such action or pleaded in set-off thereto, shall exceed the sum of five dollars, nor unless the appellant, with sufficient surety, approved by the justice, enters into an undertaking to pay and satisfy whatever final judgment may be recovered in the appellate court.

For other provisions affecting justices, the reader is referred to chapter thirty-one of the Revised Statutes relating to the District, and to the statutes above quoted from.

The probate jurisdiction for the District is in the Supreme Court holding a special term for Orphans' Court business.[1]

Court of Appeals of the District.

§ 443. The act of February 9, 1893,[2] as amended by the act of July 30, 1894,[3] provides :

SEC. 1. That there shall be, and there is hereby, established in the District of Columbia a court, to be known as the Court of Appeals of the District of Columbia, which shall consist of one chief justice and two associate justices, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold office during good behavior.

SEC. 2. That the said justices shall each receive an annual salary of six thousand dollars, payable quarterly at the Treasury of the United States, except the chief justice, who shall receive six thousand five hundred dollars.

SEC. 3. That each of said justices, before he enters upon the duties of his office, shall take the oath prescribed by law to be taken by the judges of the courts of the United States.

[1] See Rev. Stat. D. C. § 930; Middleton *v.* Parke, 3 App. D. C. 149.

[2] Act of Feb. 9, 1893, ch. 74, 27 Stat. L. 434.

[3] Act of July 30, 1894, ch. 172, 28 Stat. L. 160.

SEC. 4. That there shall be a clerk of said Court of Appeals, to be appointed by the court, who shall receive as compensation for his services in the discretion of the court, an annual salary not to exceed the sum of three thousand dollars, payable monthly at the Treasury of the United States, and who shall give bond, such as the court may determine to be satisfactory, for the faithful performance of his duties, and his duties shall be such as the court may from time to time prescribe. That the said clerk of the Court of Appeals shall, with the approval of the court, appoint one assistant or deputy clerk, who shall receive as compensation for his services, in the discretion of the court, an annual salary not to exceed the sum of two thousand dollars, payable monthly at the Treasury of the United States, and who may sign the name of the clerk to any official act required by law, or by the practice of the court, to be performed by the clerk, and may authenticate said signature by affixing the seal of the court thereto, when the impress of the seal is necessary to its authentication. In such cases the signature shall be

——— ———, Clerk.
By ——— ———, Assistant Clerk.

The court shall regulate from time to time the fees to be charged by the said clerk, which shall be accounted for at least once in each quarter, and paid into the Treasury of the United States, and said clerk shall receive such allowance for necessary expenditures in the conduct of his office as the court may determine by special or general order in the premises, but not to exceed the sum of five hundred dollars in any one year, payable as aforesaid at the Treasury of the United States.

SEC. 5. That said Court of Appeals may appoint a crier at a compensation not to exceed one hundred dollars a month, and a messenger at a compensation not to exceed sixty dollars a month, both payable at the Treasury of the United States, who shall perform such duties as may be assigned them by the court.

SEC. 6. That said Court of Appeals shall establish by rule of court such terms of the court in each year as to it may deem necessary: *Provided, however*, That there shall be at least three terms in each year, and it shall make such rules and regulations as may be necessary and proper, for the transaction of its busi-

ness and the taking of appeals to said court. And said Court of Appeals shall have power to prescribe what part or parts of the proceedings in the court below shall constitute the record on appeal and the form of bills of exception, and to require that the original papers shall be sent to it instead of copies thereof, and generally to regulate all matters relating to appeals whether in the court below or in said Court of Appeals. If any member of the court shall be absent on account of illness or other cause during the session thereof, or shall be disqualified from hearing and determining any particular cause by having been of counsel therein, or by having as justice of the Supreme Court of the District of Columbia previously passed upon the merits thereof, or if for any reason whatever it shall be impracticable to obtain a full court of three justices, the member or members of the court who shall be present shall designate the justice or justices of the Supreme Court of the District of Columbia to temporarily fill the vacancy or vacancies so created, and the justice or justices so designated shall sit in said Court of Appeals and perform the duties of a member thereof while such vacancy or vacancies shall exist: *Provided*, That no justice of the Supreme Court of the District of Columbia shall, while on the bench of said Court of Appeals, sit in review of any judgment, decree, or order which he shall have himself entered or made: *Provided also*, That if the parties to any cause shall so stipulate in writing by their attorneys and solicitors, such cause may be heard and determined by two justices of the court without calling in any of the justices of the Supreme Court of the District of Columbia: *And provided also*, That all motions to dismiss appeals and other motions may be heard by two justices, in the event of the absence or disqualification of any one of the justices as aforesaid: *And provided further*, That if in any cause heard before two justices as aforesaid the court shall be divided in its opinion, then the judgment of the lower court shall stand affirmed.

SEC. 7. That any party aggrieved by any final order, judgment or decree of the Supreme Court of the District of Columbia, or of any justice thereof, may appeal therefrom to the Court of Appeals hereby created ; and upon such appeal the Court of Appeals shall review such order, judgment or decree, and affirm, reverse, or modify the same as shall be just: *Provided, however*, That all

causes now pending before the said Supreme Court in general term, together with the original papers and record entries duly certified, shall by appropriate orders duly entered of record be transferred and delivered to the Court of Appeals hereby created, which said Court of Appeals is hereby vested with authority and jurisdiction to hear and determine the causes so transferred. The appellate power and jurisdiction of said general term is hereby abrogated and abolished, and no causes shall hereafter be heard in the said general term. Appeals shall also be allowed to said Court of Appeals from all interlocutory orders of the Supreme Court of the District of Columbia, or by any justice thereof, whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like; and also from any other interlocutory order, in the discretion of said Court of Appeals, whenever it is made to appear to said court upon petition that it will be in the interest of justice to allow such appeal.

SEC. 8. That any final judgment or decree of the said Court of Appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the Supreme Court of the District of Columbia : and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States.

SEC. 9. That the determination of appeals from the decision of the Commissioner of Patents, now vested in the general term of the Supreme Court of the District of Columbia, in pursuance of the provisions of section seven hundred and eighty of the Revised Statutes of the United States, relating to the District of Columbia, shall hereafter be and the same is hereby vested in the Court of Appeals created by this act; and in addition, any party aggrieved by a decision of the Commissioner of Patents in

any interference case may appeal therefrom to the said Court of Appeals.

SEC. 10. That the opinion of the said Court of Appeals in every case shall be rendered in writing, and shall be filed in such case as a part of the record thereof, and that the said Court of Appeals is hereby authorized to appoint a reporter, who shall serve during the pleasure of the court and without compensation and whose duty shall be to report, edit and publish, in form to be prescribed by the court, its opinions.

SEC. 11. That the said Court of Appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction.

SEC. 12. That the Attorney-General is hereby empowered and directed to provide suitable rooms and accommodations in the city of Washington for the Court of Appeals hereby created and for the transaction of its business.

SEC. 13. That the marshal of the United States for the District of Columbia shall execute the orders and processes of the Court of Appeals hereby created in the same manner as he now executes those of the Supreme Court of the District of Columbia.

SEC. 14. That the justices of the Supreme Court of the District of Columbia shall hereafter receive an annual salary of five thousand dollars each payable quarterly at the Treasury of the United States.

SEC. 15. That hereafter one-half of the amounts paid on account of salary to the justices of the Court of Appeals hereby created, and to the justices of the Supreme Court of the District of Columbia, shall be paid from the revenues of the District of Columbia.

SEC. 16. That this act shall take effect on the third day of April, eighteen hundred and ninety-three, said day being the first day of the April term of the Supreme Court of the District of Columbia in general term.

SEC. 17. That all acts and parts of acts inconsistent herewith are hereby repealed.

The Court of Appeals has no appellate jurisdiction over the police court;[1] and no power to review a judgment of the Supreme Court of the District rendered on an appeal from a justice of the

[1] *Ex parte* Dries, 3 App. D. C. 165.

peace;[1] except upon the question of the jurisdiction of that court to render the judgment.[2] As to appealable orders from the Supreme Court, the reader is referred to the cases cited in the note.[3] An appeal, in general, will not be allowed from an interlocutory order unless a strong case showing the necessity of an immediate appeal is made out.[4]

The court was duly authorized by section 6 of the act creating it to make rules limiting the time of taking appeals thereto from the decisions of the Commissioner of Patents, and there was no restriction on this power by reason of section 4894 of the Revised Statutes of the United States, limiting the time of completing applications.[5] Under section 9 of the act, the defeated party in an interference case cannot maintain a suit in equity to revise the decision of the Commissioner of Patents under section 4915 of the Revised Statutes of the United States until he has first taken an appeal to the Court of Appeals.[6] The latter court has no jurisdiction to award costs or execute any judgment therefor that may be entered in cases of appeals from the Commisioner of Patents.[7]

The Supreme Court of the District has power to hear and determine causes pending on the date of the act in the general term upon certification from its special terms to be heard there in the first instance.[8] From the judgment of that court entered in accordance with the opinion of the general term, reversing the judgment of the special term, an appeal lies to the Court of Appeals where such judgment was entered after the appellate jurisdiction of the general term was abolished by the act.[9]

[1] *Ex parte* Redmond, 3 App. D. C. 317.

[2] Sturges *v.* Hancock, 4 App. D. C. 289.

[3] See Edelin *v.* Lyon, 1 App. D. C. 87; *In re* Walter, *Ibid.* 189; Morris *v.* Wheat, *Ibid.* 237; Hayward *v.* Holman, *Ibid.* 322; Murphy *v.* Tilling, 2 *id.* 130; Westinghouse *v.* Duncan, *Ibid.* 131; Plumb *v.* Bateman, *Ibid.* 156; Shoemaker *v.* Entwisle, 3 *id.* 252; Spalding *v.* Crawford, *Ibid.* 361; Hurst *v.* Saunders, 5 *id.* 66; *In re* Howgate, *Ibid.* 74; Olmstead *v.* Webb, *Ibid.* 38; Thomas *v.* Presbey, *Ibid.* 217; U. S. Electric Lighting Co. *v.* Metropolitan Club, 6 *id.* 536; Cropper *v.* McLane, *Ibid.* 119; Brown *v.* Bradley, *Ibid.* 207; Clark *v.* Bradley Co., *Ibid.* 437.

[4] Morris *v.* Washington & G. R. Co., 6 App. D. C. 513.

[5] *In re* Hien, 166 U. S. 432.

[6] Smith *v.* Muller, 75 Fed. Rep. 612.

[7] Wells *v.* Reynolds, 5 App. D. C. 20.

[8] Ambler *v.* Archer, 1 App. D. C. 94.

[9] Arkansas *v.* Bowen, 3 App. D. C 537. See also as to the Court of Appeals, Peck *v.* Henrich, 167 U. S. 624.

Territorial Courts.

§ 444. It was provided in sections 1907 and 1908 of the Revised Statutes of the United States that the judicial power in all the territories except Arizona should be vested in a Supreme Court, district courts, probate courts, and in justices of the peace, and that in Arizona it should be vested in a Supreme Court and such inferior courts as the legislative council might by law prescribe. By section 1864, the chief and associate justices of the Supreme Court shall hold their offices for four years, and until their successors are appointed and qualified. They shall hold a term annually at the seat of government of the territory. By sections 1866–1868 the jurisdiction of the courts shall be limited by law. The Supreme Court and the district courts respectively of every territory shall possess chancery as well as common law jurisdiction. No justices of the peace shall have any jurisdiction of any case in which the title to land, or the boundary thereof, in anywise comes in question. By section 1910 each of the district courts shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States. This, it has been held, extends to all cases where jurisdiction is conferred upon the latter courts by subsequent laws.[1]

The act of April 7, 1874,[2] reads as follows:

"*Whereas*, by the organic acts establishing several of the territories of the United States, it is provided that certain courts thereof shall have common-law and chancery jurisdiction, and doubts have been entertained whether said jurisdictions must be exercised separately, or whether they may be exercised together in the same proceeding, and whether the codes and rules of practice adopted in said territories which have authorized a mingling of said jurisdictions in the same proceeding, or a uniform course of proceeding in all cases legal and equitable, are repugnant to the said organic acts respectively: Therefore, *Be it enacted*, etc., That it shall not be necessary in any of the courts of the several territories of the United States to exercise separately the common-law and chancery jurisdictions vested in said courts;

[1] Johnson *v.* U. S., 6 Utah 403. See also, as to this section, U. S. *v.* Falshaw (Ariz.), 40 Pac. Rep. 209.

[2] Act of April 7, 1874, ch. 80, 18 Stat. L. 27.

and that the several codes and rules of practice adopted in said territories respectively, in so far as they authorize a mingling of said jurisdictions or a uniform course of proceeding in all cases whether legal or equitable, be confirmed; and that all proceedings heretofore had or taken in said courts in conformity with said respective codes and rules of practice, so far as relates to the form and mode of proceeding, be, and the same are hereby, validated and confirmed; *Provided*, That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.

"SEC. 2. That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe: *Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal."[1]

By the act of March 3, 1885,[2] no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

SEC. 2. The preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all

[1] See, as to the effect of this act, Walker *v.* New Mex. & So. Pac. R. Co., 165 U. S. 593; Amer. Pubg. Co. *v.* Fisher, 166 *id.* 464.

[2] Act of March 3, 1885, ch. 355, 23 Stat. L. 443.

such cases an appeal or writ of error may be brought without regard to the sum or value in dispute.

By the act of March 3, 1891,[1] the circuit courts of appeals, in cases in which the judgments of the circuit courts of appeals are made final by this act, shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders and decrees of the Supreme Courts of the several territories as by this act they may have to review the judgments, orders and decrees of the district court and circuit courts; and for that purpose the several territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits.

By section 1874 of the Revised Statutes the judges of the Supreme Court of each territory are authorized to hold court within their respective districts in the counties wherein by the laws of the territory courts have been or may be established, for the purpose of hearing and determining all matters and causes, except those in which the United States is a party; but the expense of holding such courts shall be paid by the territory, or by the counties in which the courts are held, and the United States shall in no case be chargeable therewith.

By the act of March 3, 1885,[2] an Indian committing certain crimes against the person or property of another Indian or other person within any territory of the United States and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to those crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all persons charged with the commission of such crimes, and jurisdiction is given to those courts in all such cases.[3] But by the act of May 2, 1890,[4] the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties.[5] When the enabling act,

[1] Act of March 3, 1891, ch. 517, § 15, 26 Stat. L. 826, etc.

[2] Act of March 3, 1885, ch. 341, 23 Stat. L. 385.

[3] See Pablo *v.* Peo. (Colo.), 46 Pac. Rep. 636.

[4] Act of May 2, 1890, ch. 182, § 30, 26 Stat. L. 81, etc.

[5] See, as to the jurisdiction of Indian tribunals, Nofire *v.* U. S., 164 U. S. 657; *In re* Mayfield, 141 *id.* 107; Cornells *v.* Shannon, 27 U. S. App. 329;

admitting a State into the Union, contains no exclusion of jurisdiction as to crimes committed on an Indian reservation by others than Indians or against Indians, the state courts are vested with jurisdiction to try and punish such crimes.[1]

On the trial in a territorial court of an offence against the laws of the United States, the question whether such offence is a felony or a misdemeanor is to be determined by reference to the laws of the United States and not those of the territory.[2]

The provisions of Title XXIII. of the Revised Statutes have been largely superseded by subsequent statutes establishing courts in particular territories. A brief review of these will not be out of place here.

In Alaska, by the act of May 17, 1884,[3] a district court is established with the civil and criminal jurisdiction of district courts of the United States and of such courts exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law. A district judge is to be appointed for the district and the terms and sessions of the court are regulated. By section 5, four commissioners are to be appointed by the President with the powers of Oregon justices of the peace, probate jurisdiction and power to grant writs of *habeas corpus* and act as notaries public. By section 7, the district court shall have exclusive jurisdiction in all cases in equity or those involving a question of title to land, or mining rights, or the constitutionality of a law, and in all capital offences. The general laws of Oregon are to prevail. In all civil cases at common law any issue of fact shall be determined by a jury at the instance of either party; and an appeal shall lie in any case, civil or criminal, from the judgment of the commissioners to the district court

Standley *v.* Roberts, 19 *id.* 407; Mehlin *v.* Ice, 12 *id.* 305; *Ex parte* Kyle, 67 Fed. Rep. 306; McCurtain *v.* Grady (Ind. Ty. Ct. Apps.), 38 S. W. Rep. 65.

[1] Draper *v.* U. S., 164 U. S. 240; U. S. *v.* McBratney, 104 *id.* 621. See as to the transfer of actions from territorial to state courts, Koenigsberger *v.* Richmond Silver Min. Co., 158 U. S. 41; Crown Point Min. Co. *v.* Ontario Silver Min. Co., 74 Fed. Rep. 419; Fraser *v.* Trent, *Ibid.* 423; Sargent *v.* Kindred, 49 *id.* 485; Braithwaite *v.* Jordan (N. D.), 65 N. W. Rep. 701; Sargent *v.* Kindred (N. D.), 63 *id.* 151; Thompson *v.* Schaetzel, 2 S. D. 395; Wing *v.* Chic. & N. R. Co., 1 *id.* 455.

[2] U. S. *v.* Vigil (New Mex.), 34 Pac. Rep. 530.

[3] Act of May 17, 1884, ch. 53, § 3, 23 Stat. L. 24.

where the amount involved in any civil case is two hundred dollars or more, and in any criminal case where a fine of more than one hundred dollars or imprisonment is imposed, upon the filing of a sufficient appeal bond by the party appealing, to be approved by the court or commissioner.

Alaska has been assigned to the ninth judicial circuit.

In Arizona, by the act of February 11, 1891,[1] the Supreme Court is to consist of a chief justice and three associate justices, any three of whom shall constitute a quorum; but no justice shall act as a member of the Supreme Court in any action or proceeding brought to such court by writ of error, bill of exception, or appeal from a decision, judgment or decree rendered by him as judge of a district court, unless one of the other justices is disqualified to sit in such action. The territory is divided into four judicial districts, and a district court is to be held in each district by one of the justices of the Supreme Court, at such time and place as is or may be prescribed by law.

Arizona has been assigned to the ninth judicial circuit.

In Indian Territory, by the act of March 1, 1889,[2] a United States court is established, to consist of a judge, appointed by the President of the United States, by and with the advice and consent of the Senate, who shall hold his office for a term of four years and until his successor is appointed and qualified. The court shall have exclusive original jurisdiction over all offences against the laws of the United States committed within Indian Territory, not punishable by death or by imprisonment at hard labor, and not committed by one Indian upon the person or property of another Indian, and shall have jurisdiction in all civil cases between citizens of the United States who are residents of Indian Territory, or between citizens of the United States, or of any state or territory therein, and any citizen of or person or persons residing or found in Indian Territory, and when the value of the thing in controversy or damages or money claimed shall amount to one hundred dollars or more, but not over controversies between persons of Indian blood only. Laws having the effect to prevent the Cherokee, Choctaw, Creek, Chickasaw and Seminole nations, or either of them, from lawfully entering into leases or contracts

[1] Act of Feb. 11, 1891, ch. 131, 26 Stat. L. 747.

[2] Act of March 1, 1889, ch. 333, 25 Stat. L. 783.

for mining coal for a period not exceeding ten years, are repealed, and the court is given jurisdiction over all controversies arising out of said mining leases or contracts, and of all questions of mining rights or invasions thereof, where the amount involved exceeds the sum of one hundred dollars. The laws of the United States as to procedure are to govern the court, so far as applicable, but the practice, pleadings and forms of proceeding in civil causes shall conform, as near as may be, to those existing at the time in like causes in the courts of Arkansas.

By the act of May 2, 1890,[1] the jurisdiction conferred by the above act is extended to all civil cases in Indian Territory, except cases over which the tribal courts have exclusive jurisdiction, to all cases on contracts entered into by citizens of any tribe or nation with citizens of the United States in good faith and for valuable consideration, and in accordance with the laws of such tribe or nation, which contracts are to be deemed valid and enforceable, and to all cases over which jurisdiction is conferred by this act or may hereafter be conferred by act of Congress. But the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties, and as to all such cases the laws of Arkansas put in force by this act shall not apply. The Constitution and criminal laws of the United States are applicable, as well as all laws relating to national banking associations, but nothing in the act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood or adoption, are the sole parties, nor so as to interfere with the right and powers of such nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States. Original jurisdiction is conferred in certain cases relating to the government and protection of Indians, and exclusive original jurisdiction of certain crimes against justice committed in Indian Territory. Jurisdiction is also conferred over all controversies arising between members or citizens of one tribe or nation of Indians and the members or citizens of other

[1] Act of May 2 1890, ch. 182, §§ 29, etc., 26 Stat. L. 81, etc.

tribes or nations in Indian Territory; and any citizen or member of one tribe or nation who may commit any offence or crime against the person or property of a citizen or member of another tribe or nation shall be subject to the same punishment as he would be if both parties were citizens of the United States. And any member or citizen of any Indian tribe or nation in Indian Territory shall have the same right to invoke the aid of the court for the protection of his person or property as against any person not a member of the same tribe or nation, as though he were a citizen of the United States.

By the Act of March 1, 1895,[1] Indian Territory is divided into three judicial districts, to be known as the northern, central and southern districts, and at least two terms of the United States court are to be held each year at each place of holding court in each district at such regular times as the judge for such district shall fix and determine. The President, by and with the advice and consent of the Senate, is to appoint two additional judges of this court who shall hold their offices for the term of four years from the date of their appointment, one of whom shall be judge of the northern, the other of the southern district, while the judge already in office shall be judge of the central district during the remainder of his term. Each judge is to be paid a salary of five thousand dollars per annum, and each of the additional judges is to have the same powers as the former judge or as a judge in the circuit and district courts of the United States. Attorneys and marshals are to be appointed by the President, and clerks are to be appointed by the judges. Each judge may appoint commissioners, not exceeding six in number, within his district, who shall be *ex officio* notaries public and justices of the peace and have the power to solemnize marriages.[2] The Arkansas criminal law and procedure are to be in force, provided that in all cases where they conflict with the laws of the United States with regard to the punishment of offences, the latter shall govern as to such offences, except for the crime of larceny, the punishment of which shall be according to the Arkansas law. The original jurisdiction of the commissioners as justices of the peace in civil cases shall, in all those classes of

[1] Act of March 1, 1895, ch. 145, 28 Stat. L. 693.

[2] See Hardy *v.* U. S., 36 U. S. App. 225.

cases where jurisdiction is by the act conferred upon the United States court, be exclusive where the amount or value of the demand or of the property or thing in controversy does not exceed one hundred dollars. The commissioners, acting as justices of the peace in criminal cases, shall have jurisdiction to hold preliminary examinations and discharge, hold to bail, or commit in cases of offences which, under the laws applicable to the Territory, amount to felonies. Appeals may be taken to the United States court from the final judgment of the commissioners, acting as justices of the peace, in all cases, but no appeal shall be allowed in civil cases where the amount of the judgment, exclusive of costs, does not exceed twenty dollars. By section 11 of the same act it is provided that the judges of this court shall constitute a Court of Appeals, to be presided over by the judge oldest in commission as chief justice of said court. This court shall have similar jurisdiction and powers to those of the Supreme Court of Arkansas, and the procedure in that state with regard to appeals and writs of error is to be followed. Writs of error and appeals from the final decision of the appellate court shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States. This jurisdiction of the circuit court of appeals is extended by the act of February 8, 1896,[1] to cases pending therein upon writ of error to or appeal from the United States court in Indian Territory, where the former court would have had jurisdiction but for the act of March 1, 1895.[2]

The above acts regulate the proceedings in the courts described, but it is not necessary here to go into the details of such proceedings.

Though in general, it is not presumed that the English common law is in force in Indian Territory or in an Indian nation,[3] yet when Congress by the act of March 1, 1889, *supra*, with the assent of the Indians created the United States court in Indian Territory, it gave that court authority and imposed

[1] Act of Feb. 8, 1896, ch. 14, Stat. 1895-96, 6.

[2] See Gowen *v.* Bush, 36 U. S. App. 543; Scott *v.* Hamner, *Ibid.* 547.

[3] Davison *v.* Gibson, 12 U. S. App. 362.

upon it the duty, to apply the established rules and principles of the common law to the cases within its jurisdiction, where no proof is made of the laws, rules or customs obtaining in that territory.[1] The acts of 1889 and 1890 do not confer on that court jurisdiction of an action against the Choctaw Nation or its chief executive officers, when sued in their capacity as such, for an alleged debt or liability of the Nation, against which the judgment will operate.[2] Nor have Congress granted to the court authority to entertain and determine actions brought by a tribe of Indians in the territory to collect a tax imposed by the tribe upon a citizen of the United States residing therein.[3] The court has jurisdiction in civil actions where the aggregate of the damages or money claimed amounts to one hundred dollars, although the value of each of several articles sued for may be less than that sum.[4]

In New Mexico, by the act of July 10, 1890,[5] the Supreme Court shall hereafter consist of a chief justice and four associate justices, any three of whom shall constitute a quorum; but the judge who presided at the trial of a cause in the court below shall not sit at the hearing of the same case on appeal or writ of error, in the Supreme Court. The territory is divided into five judicial districts and a district court is to be held in each district by one of the justices of the Supreme Court, at such time and place as is or may be prescribed by law.[6] Each judge, after assignment, shall reside in the district to which he is assigned. A trial judge, in New Mexico, may continue any special term

[1] Pyeatt *v.* Powell, 10 U. S. App. 200. And see Ark. City Bk. *v.* Swift (Kan.), 46 Pac. Rep. 950.

[2] Thebo *v.* Choctaw Tribe, 27 U. S. App. 657. See, as to controversies between the Choctaw Coal and Railway Co. and Indians through whose territory the railway runs: Gowen *v.* Harley, 12 *id.* 574.

[3] Crabtree *v.* Madden, 12 U. S. App. 159.

[4] Gulf, Colo. & S. F. R. Co. *v.* Washington, 4 U. S. App. 121. As to actions *in forma pauperis*, see St. Louis & S. F. R. Co. *v.* Farr, 12 *id.* 520. As to Arkansas statutes in force, see Leak Glove Manufg. Co. *v.* Needles, 69 Fed. Rep. 68. As to the Court of Appeals of the territory, see Grady *v.* Newman, 37 S. W. Rep. 54; Kearney *v.* Liverpool & L. & G. Ins. Co., *Ibid.* 143.

[5] Act of July 10, 1890, ch. 665, 26 Stat. L. 226.

[6] As to the jurisdiction of the district courts, see Schofield *v.* Stephens (N. M.), 38 Pac. Rep. 319; Lincoln-Lucky & Lee Min. Co. *v.* Distr. Ct. (N. M.), *Ibid.* 580.

he is holding until a pending case is concluded, even if the proceedings of the special terms are thereby prolonged beyond the day fixed for the regular term.[1]

New Mexico has been assigned to the eighth judicial circuit.

In Oklahoma, by the act of May 2, 1890,[2] as amended by the act of December 21, 1893,[3] the judicial power of the territory is vested in a Supreme Court, district courts, probate courts and justices of the peace. The Supreme Court consists of a chief justice and four associate justices, any three of whom constitute a quorum; but three judges must concur to render an opinion reversing a judgment or other determination of the district court. They shall hold their offices for four years and until their successors are appointed and qualified, and they shall hold a term annually at the seat of government of the territory. The jurisdiction of these courts shall be as limited by law, but justices of the peace shall not have jurisdiction of any matter in controversy where the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars. And the Supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the territory affecting persons or property. The territory shall be divided into five judicial districts, and a district court shall be held in each county by one of the justices of the Supreme Court. The Supreme Court shall define the judicial districts and fix the times and places at each county seat in each district where the district court shall be held, and designate the judge who shall preside therein, and each judge, after assignment, shall reside in the district to which he is assigned. The Supreme Court, or the chief justice thereof, may designate any judge to try a particular case or cases in any district when the judge of that district has been of counsel or is of kin to either party to the action, or interested, or is biased or prejudiced in the cause, or if for any other reason he is unable to hold court; and no justice of the Supreme Court shall sit as a member thereof in the trial or hearing of any case decided by him in the district

[1] Gonzales *v.* Cunningham, 164 U. S. 612.

[2] Act of May 2, 1890, ch. 182, §§ 9, etc., 26 Stat. L. 81, etc.

[3] Act of Dec. 21, 1893, ch. 5, 28 Stat. L. 164.

court, or wherein he has any interest. Writs of error, bills of exception and appeals shall be allowed in all cases from the final decisions of the district courts under such regulations as may be prescribed by law, but in no case removed to the Supreme Court shall trial by jury be allowed in that court. Each of the district courts shall have and exercise, exclusive of any court heretofore established, the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States. The district courts have also jurisdiction over all controversies arising between members or citizens of one tribe or nation of Indians and the members or citizens of other tribes or nations in the territory, and any citizen or member of one tribe or nation who may commit any offence or crime in the territory against the person or property of a citizen or member of another tribe or nation, shall be subject to the same punishment as he would be if both parties were citizens of the United States; and any person residing in the territory shall have the right to invoke the aid of courts therein for the protection of his person or property, as though he were a citizen of the United States; but nothing in the act shall be so construed as to give jurisdiction to the courts established in the territory in controversies arising between Indians of the same tribe, while sustaining their tribal relations. Many of the provisions of the laws of Nebraska are extended to and put in force in the territory, and the Supreme and district courts have the same power to enforce these laws as courts of like jurisdiction have in that state; but county courts and justices of the peace shall have and exercise the jurisdiction which is authorized by said laws of Nebraska, provided, that the jurisdiction of justices of the peace shall not exceed the sum of one hundred dollars, and county courts shall have jurisdiction in all cases where the sum or matter in demand exceeds the sum of one hundred dollars.[1] Greer county is excepted from these provisions, but the act of May 4, 1896,[2] regulates judicial proceedings in that county. By the act of March 3, 1891,[3] it is provided that in addition to the jurisdiction granted to the probate courts

[1] See Allison *v.* Berger, 1 Okla. 1.

[2] Act of May, 4, 1896, ch. 155, Stat. 1895–96, 113.

[3] Act of March 3, 1891, ch. 543, § 17, 26 Stat. L 989, etc.

in Oklahoma by legislative enactments, the probate judges of that territory are granted such jurisdiction in town site matters, and under such regulations as are provided by the laws of the state of Kansas.

Oklahoma has been assigned to the eighth judicial circuit.

Interstate Commerce Commission; Statutes.

§ 445. The creation and organization of this commission was a great stride made by Congress toward the regulation of commerce among the states. The amount of business within its jurisdiction is immense, and while it is not, strictly speaking, a court, yet it has certain judicial powers and functions that entitle it to at least a brief notice in a work like this.[1] In the present section the statutes dealing with the subject will be briefly outlined, and in the following section some of the more important decisions on the jurisdiction, powers and procedure of the commission will be considered.

The original "act to regulate commerce" of February 4, 1887,[2] was amended by the acts of March 2, 1889,[3] February 10, 1891,[4] and February 8, 1895.[5] It will be unnecessary to go into the details of the act and its amendments. A brief summary of their provisions will suffice for our present purpose.

These provisions apply "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment, from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such

[1] For an account of the history of the act to regulate commerce, see 1, C. C. Rep. 74, 256.

[2] Act of Feb. 4, 1887, ch. 104, 24 Stat. L. 379.

[3] Act of March 2, 1889, ch. 382, 25 Stat. L. 855.

[4] Act of Feb. 10, 1891, ch. 128, 26 Stat. L. 743.

[5] Act of Feb. 8, 1895, ch. 61, 28 Stat. L. 643.

place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country; *Provided, however*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state, and not shipped to or from a foreign country from or to any state or territory as aforesaid."

The act goes on to provide that charges shall be reasonable and just, and, if not so, they shall be unlawful. Special rates, rebates, drawbacks, etc., as well as undue preferences, are prohibited. Equal facilities are to be afforded connecting lines. The charge for short haul must not, with certain exceptions, be more than for long haul. The pooling of freights or earnings is prohibited, as are combinations to prevent the continuous carriage of freight to its destination. Persons damaged by a violation of these provisions may complain to the commission established by the act or sue personally in any district or circuit court of the United States of competent jurisdiction, but must elect which of these methods to adopt. A commission is created and established to be known as the Inter-State Commerce Commission, which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The commissioners first appointed shall continue in office for the term of two, three, four, five and six years respectively, but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Any commissioner may be removed by the President for inefficiency, neglect of duty or malfeasance in office, and not more than three of them shall be appointed from the same political party. Persons in the employ of, or holding official relations with, or owning the stock or bonds of, or in any matter pecuniarily interested in any common carrier subject to the provisions of the act are not eligible for the office of commissioner, and no commissioner shall engage in any other business, vocation or employment. The commission shall have authority to inquire into the management of the business of all common carriers subject to the provisions of the act, and shall keep itself informed as to the

manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable it to perform the duties and carry out the objects for which it was created, and it is authorized and required to execute and enforce the provisions of the act. It is made the duty of any district attorney to institute suit on the application of the commission, and the latter may require by subpœna the attendance and testimony of witnesses and the production of books, papers, etc., and, if such subpœna is disobeyed, invoke the aid of court for its enforcement. Testimony may also be taken by deposition, under certain regulations.

Complaints of violations of the provisions of the act may be made by petition to the commission, stating briefly the facts, and a statement of the charges made shall thereupon be forwarded by the commission to the common carrier, who shall be called upon to satisfy the complaint or answer the same in writing within a reasonable time, to be specified by the commission. If reparation is made within that time, the carrier is relieved of liability only for the particular violation complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating the complaint, it is the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper. It shall in like manner investigate any complaint forwarded by the railroad commissioner or commission of any state or territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Whenever an investigation shall be made by the commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which its conclusions are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings are thereafter, in all judicial proceedings, to be deemed *prima facie* evidence as to each and every fact found.

All reports of investigations made by the commission shall be entered of record, and a copy thereof furnished to the complainant, and to any common carrier that may have been complained of. The publication of its reports and decisions may be provided for by the commission.

Where on investigation it appears to the satisfaction of the commission that the provisions of the act have been violated, it shall be the duty of the commission forthwith to cause a copy of its report in respect thereto to be delivered to the common carrier, together with a notice to such carrier, to cease and desist from such violation, or to make reparation for the injury, or both, within a reasonable time, to be specified by the commission. If, within that time, it shall be made to appear to the commission that the injury has ceased or reparation has been made, a statement to that effect shall be entered of record by the commission and the common carrier shall thereupon be relieved from further liability or penalty for that particular violation. Whenever the common carrier has refused to obey the lawful order or requirement of the commission, not founded upon a controversy requiring a trial by jury, the commission, or any person interested, may apply in a summary way by petition to the circuit court of the United States sitting in equity in the proper district, which may hear and determine the matter on short notice as a court of equity without formal pleadings, and on such hearing the report of the commission is to be *prima facie* evidence of the facts therein stated. If it appears that the lawful order or requirement of the commission has been violated, the court may issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such violation and enjoin obedience, and, in case of disobedience to such writ, may issue writs of attachment or other process applicable to writs of injunction, etc., and, if it shall think fit, impose a fine, if the injunction, etc., is not obeyed. It is made the duty of the Attorney-General of the United States to prosecute any such petition filed or presented by the commission.

If the matters involved in any such order or requirement of the commission are founded upon a controversy requiring a trial by jury, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way to the circuit court of the United States sitting as a court of law in

the proper district, alleging the violation or disobedience, and the court shall fix a time and place for the trial of the cause, and at the trial the findings of fact by the commission are to be *prima facie* evidence. But if all the parties shall waive a jury in writing, the court shall try the issues and render its judgment thereon. If the judgment of the circuit court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case.

The commission may conduct its proceedings in such manner as will best conduce to the proper despatch of business and to the ends of justice. A majority shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. It may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before it and be heard in person or by attorney. Every vote and official act of the commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. It shall have an official seal, and any of its members may administer oaths and affirmations and sign subpœnas. Each commissioner is to receive an annual salary of $7,500, and provision is made for the appointment of a secretary and other employees. The principal office is in the city of Washington, where the general sessions are to be held, but, whenever more convenient, special sessions may be held in any part of the United States; so any inquiry may be prosecuted by one or more of the commissioners in any part of the country. Annual reports may be required to be made by all common carriers, and the commission may prescribe a uniform system of accounts. The commission must also make an annual report. Nothing in the act is to prevent reduced rates of personal conveyance or carriage, etc., of goods for government purposes, charity, fairs, destitute persons, ministers, inmates of Soldiers' Homes, etc., officers and employees of the rail-

road, or the issue of joint interchangeable five-thousand-mile tickets with special privileges, under certain circumstances.

The act of August 7, 1888,[1] compels all subsidized railroad and telegraph companies to construct, maintain or operate telegraph lines, and give equal facilities to connecting lines. It is made the duty of the interstate commerce commission, on proper application,[2] to ascertain the fact of violation of these provisions, and determine and order what arrangement shall be made and, if necessary, enforce the same by writ of mandamus in the courts of the United States, in the name of the United States, at the relation of any one of the commissioners; but the commissioners may institute any inquiry upon their own motion in the same manner and to the same effect as though complaint had been made. Contracts between the companies are to be filed with the commission and annual reports are to be made to it.

The act of February 11, 1893,[3] provides "that no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the interstate commerce commission, or in obedience to the subpœna of the commission, whether such subpœna be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress entitled, 'An act to regulate commerce,' or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding; *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce

[1] Act of Aug. 7, 1888, ch. 772, 25 Stat. L. 382.

[2] See Un. Pac. R. Co. *v.* U. S., 59 Fed. Rep. 813.

[3] Act of Feb. 11, 1893, ch. 83, 27 Stat. L. 443.

books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpœna or lawful requirement of the commission, shall be guilty of an offense, and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

By the act of March 2, 1893,[1] supervision is given to the commission of railway safety appliances used in interstate commerce.

By the act of July 31, 1894,[2] the Auditor for the State and other Departments is to receive and examine all accounts relating to the Interstate Commerce Commission.

There are other statutory provisions relating to the commission which are not of sufficient importance to warrant mention here.

Jurisdiction, Powers and Procedure of the Commission.

§ 446. Several important cases have been recently decided by the Supreme Court of the United States on the nature and powers of the commission. In one of them it was held that the commission is a body corporate, with legal capacity to be a party plaintiff or defendant in the Federal courts; that in enacting the interstate commerce acts Congress had in view, and intended to make a provision for commerce between states and territories, commerce going to and coming from foreign countries, and the whole field of commerce except that wholly within a state, and conferred upon the commission the power of determining whether, in given cases, the services rendered were like and contemporaneous, whether the respective traffic was of a like kind and whether the transportation was under substantially similar circumstances and conditions. The court said: "The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: That the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations: That, in passing

[1] Act of March 2, 1893, ch. 196, 27 Stat. L. 531.

[2] Act of July 31, 1894, ch. 174, § 7, 28 Stat. L. 162, etc.

upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment: That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unreasonable, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered. That if the commission, instead of confining its action to redressing, on complaint made by some particular person, firm, corporation or locality, some specific disregard by common carriers of provisions of the act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country."[1]

In another case it was held that the commission is not empowered either expressly or by implication to fix rates; but, subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their

[1] Tex. & Pac. R. Co. *v.* Insterst. Com. Comn., 162 U. S. 197, 233. Three of the justices dissented: see the 10th Ann. Rep. of the Comn., p. 6.

traffic, to adjust and apportion their rates so as to meet the necessities of commerce and, generally, to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.[1]

The orders of the commission should always have in view the purpose of promoting commerce and the welfare of carriers, traders and consumers.[2] An order which rests upon an erroneous principle and is unreliable cannot be sustained and is not enforceable.[3] The commission is authorized to determine whether the practices of the carrier complained of are unlawful, and to what extent, and to require such carrier by suitable order to desist not only from doing what is ascertained to be unlawful, but from omitting to do what is found to be lawful.[4] The power to "regulate" the accessorial service facilities must be confined to the existing state of things in regard to the use of its property by each carrier: the commission and the courts have no authority to invade rights of property to carry out the proposed regulation.[5] The commission has no authority to order or sanction the giving of special privileges.[6] Nor can it compel carriers to provide any particular kind of cars or other special equipment.[7] The fact that the property and affairs of a carrier

[1] Cinc., N. O. & Tex. Pac. R. Co. *v.* Interst. Com. Comn., 162 U. S. 184. This case was followed in Interst. Com. Comn. *v.* Cinc., N. O. & Tex. Pac. R. Co. 76 Fed. Rep. 183; Same *v.* Ala. Midland R. Co., 74 *id.* 715; Same *v.* Lehigh Val. R. Co., *Ibid.* 784; Same *v.* Northeastern R. Co., *Ibid.* 70. See Perry *v.* Fla. Cent. & P. R. Co., 5 I. C. C. Rep. 97; Murphy, Wasey & Co. *v.* Wabash R. Co., *Ibid.* 122; Coxe Bros. & Co. *v.* Lehigh Val. R. Co., 4 I. C. C. Rep. 535. The commission, however, contended that the language of the Supreme Court had reference only to a fixing of rates in the first instance without notice or hearing: see 10th Ann. Rep. of the Comn., p. 22. But this was denied in Interst. Com. Comn. *v.* Cinc., N. O. & Tex. Pac. R. Co., 167 U. S. 479, 508, where the original decision is followed and further developed. See also Interst. Com. Comn. *v.* Ala. Midland R. Co., *infra.*

[2] Interst. Com. Comn. *v.* Ala. Midland R. Co., 74 Fed. Rep. 715, affirmed in 18 Sup. Ct. Rep. 45. And see Interst. Com. Comn. *v.* Detroit, G. H. & M. R. Co., 167 U. S. 633.

[3] Interst. Com. Comn. *v.* Lehigh Val. R. Co., 74 Fed. Rep. 784.

[4] Page *v.* Del., Lack. & W. R. Co., 6 I. C. C. Rep. 548.

[5] Detroit, G. H. & M. R. Co. *v.* Interst. Com. Comn., 74 Fed. Rep. 803.

[6] *In re* The St. Louis Millers' Assn., 1 I. C. C. Rep. 20; *In re* The Iowa Barb Steel Wire Co., *Ibid.* 17.

[7] Rice *v.* Cinc., Wash. & B. R. Co., 5 I. C. C. Rep. 193.

have been placed by a United States court in the hands of a receiver does not affect the jurisdiction of the commission.[1]

When an investigation by the commission to inquire into the business of a common carrier has been fully concluded as to some matters, and not as to others, an order may be made *pendente lite* as to the former and the cause retained for further consideration and order as to the latter.[2] The commission has authority to institute investigations and deal with violations of the law independently of a formal complaint or of direct damage to a complainant.[3] Thus when one makes complaint under the act and sets up a personal grievance which he fails to prove, the commission may, nevertheless, if a violation of law by the defendant appears, retain the case and take the necessary steps to bring such violation to an end.[4] When a carrier fails to answer a complaint filed under Section 13 of the act, the commission will take such proof of facts as may be deemed proper and reasonable and make such order thereon as the circumstances of the case appear to require.[5]

When a question of general public interest is involved, the commission in its own discretion and in furtherance of justice may open a case to give parties the benefit of a more extended investigation of the same subject matter in other pending cases.[6] It will promptly and carefully examine an application for a rehearing with a view to the immediate correction of any error of law or fact found to exist; but will not direct a rehearing involving expense to the parties unless satisfied that the re-argument will have the effect of changing the result of what the commission has already done.[7] But the commission is not precluded from rehearing a particular case and amending or modifying its original order therein by the refusal of the circuit court

[1] Bd. of Trade of Troy, Ala., *v.* Ala. Midland R. Co., 6 I. C. C. Rep. 1. And prior leave of the court appointing the receiver is not necessary: Evans *v.* Un. Pac. R. Co., *Ibid.* 520.

[2] *In re* Boston & Me. R. Co., 5 I. C. C. Rep. 69.

[3] *In re* Grand Trunk R. Co. of Canada, 3 I. C. C. Rep. 89.

[4] Smith *v.* North. Pac. R. Co., 1 I. C. C. Rep. 208. And see Page *v.* Del., Lack. & W. R. Co., 6 *id.* 148.

[5] The Tecumseh Celery Co. *v.* Chic., J. & M. R. Co., 5 I. C. C. Rep. 663.

[6] Rice *v.* West. N. Y. & Pa. R. Co., 3 I. C. C. Rep. 87.

[7] Riddle, Dean & Co. *v.* Pittsb. & L. E. R. Co., 1 I. C. C. Rep. 490. See also *In re* Produce Exchange of Toledo, 2 *id.* 588.

to enforce such order against the carriers affected thereby, especially when the reasons assigned for such refusal do not relate to the principal question in controversy and are consistent with an approval of the amended or modified order.[1]

The commission will not express opinions on abstract questions, nor on questions presented by *ex parte* statements of fact, nor on questions of construction of the statute presented for its advice but without any controversy pending before it on complaint of violation of law.[2] In a case instituted by complaint and strictly *inter partes*, matter not expressly put in issue by the pleadings or necessarily involved in issues so presented, cannot be authoritatively determined by the commission.[3] Its report and findings upon the evidence relate only to the ascertainment and presentation of all the material facts necessary fairly and justly to present the merits of the controversy, and it does not report evidence which is only cumulative or which is immaterial or irrelevant or mere details of evidence already embraced in substantial facts stated, upon which its findings and conclusions are made.[4] But it is not sufficient that the report should be made up of mere conclusions with respect to either law or fact. Suitable reference to the evidence should be made where there is a dispute, and the failure to receive and account for it or to dispose of an issue of fact is an error in law.[5] A procedure for the enforcement of lawful orders of the commission founded upon controversies requiring trial by jury having been provided by the statute, it is the duty of the commission to pass upon the question of reparation for past damages whenever a claim is made therefor.[6] It is not authorized to award the counsel and attorneys' fees which may by the statute be given by a court.[7] The commission will not make an order for relief under the fourth section of the act except upon verified petition and

[1] Page *v.* Del., Lack. & W. R. Co., 6 I. C. C. Rep. 548.

[2] *In re* the Order of Railway Conductors, 1 I. C. C. Rep. 8; Pa. Co. *v.* Louisv., N. A. & C. R. Co., 3 *id.* 223.

[3] Commercial Club of Omaha *v.* Chic., R. I. & Pac. R. Co., 6 I. C. C. Rep. 647.

[4] Riddle, Dean & Co. *v.* Pittsb. & L. E. R. Co., 1 I. C. C. Rep. 490.

[5] Interst. Com. Comn. *v.* Louisv. & N. R. Co., 73 Fed. Rep. 409.

[6] Macloon *v.* Chic. & N. R. Co., 5 I. C. C. Rep. 84.

[7] Councill *v.* Western & Atl. R. Co., 1 I. C. C. Rep. 339.

after investigation into the facts.[1] But under the amendments to the original statute, the formal preliminary investigation authorized by that act is unnecessary.[2] In laying down rules upon the subject of what an application shall contain for the compulsory production of books, papers, etc., the commission is governed by the provisions of the act and its objects and purposes, but will also consider the practice in the United States courts and the rules prescribed by Federal statutes in analogous proceedings.[3] The provision authorizing the circuit courts to use their process in aid of inquiries before the commission is not unconstitutional as imposing on judicial tribunals duties not judicial in their nature.[4] Nor is the act of February 11, 1893,[5] unconstitutional. It affords a witness before the commission absolute immunity against prosecution, Federal or state, for the offence to which the question relates and deprives him of his constitutional right to refuse to answer.[6]

An order made by the commission is essentially an administrative order, and is not final or conclusive in the sense that the judgment or decree of a court is. And an order of a United States court enforcing an order of the commission does not change its character or make it a final judgment.[7] The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation and report. In respect to interstate commerce matters covered by the law, the commission may be regarded as the general referee of each and every circuit court of the United States upon which the jurisdiction is conferred of enforcing the rights, duties and obligations recognized by the statute. The circuit court is not the mere executioner of the commission's order. The suit therein is an original and independent proceeding in which the commission's report is made *prima facie* evidence. The court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines causes *de novo*, upon

[1] *In re* South. Pac. R. Co., 1 I. C. C. Rep. 6.

[2] U. S. *v.* Mo. Pac. R. Co., 65 Fed. Rep. 903.

[3] Rice *v.* Cinc., W. & B. R. Co., 3 I. C. C. Rep. 186.

[4] Interst. Com. Comn. *v.* Brimson, 154 U. S. 447.

[5] Act of Feb. 11, 1893, ch. 83, *supra*.

[6] Brown *v.* Walker, 161 U. S. 591.

[7] Interst. Com. Comn. *v.* Louisv. & N. R. Co., 73 Fed. Rep. 409.

proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matter in controversy.[1] Thus the rule of estoppel by record which is at all times technical in character and applies to the records of courts and proceedings before Federal officials whose acts are final is not applicable to a complaint before the commission.[2] But the power given to the courts to compel obedience to the "lawful order" of the commission, does not give them authority to modify or change it.[3] It cannot substitute for an order actually made one such as the commission might or should have made, or such as it intended, but failed, to make.[4] No appeal lies to the Supreme Court from decisions of the commission.[5]

[1] Kentucky & I. Bridge Co. *v.* Louisv. & N. R. Co., 37 Fed. Rep. 567. And see Interst. Com. Comn. *v.* Atchison, T. & S. F. R. Co., 50 *id.* 295; *In re* Alleged Excessive Freight Rates, 4 I. C. C. Rep. 116.

[2] Toledo Produce Exchange *v.* Lake Shore & M. S. R. Co., 5 I. C. C. Rep. 166.

[3] Detroit, G. H. & M. R. Co. *v.* Interst. Com. Comn., 74 Fed. Rep. 803.

[4] Interst. Com. Comn. *v.* Del., Lack. & W. R. Co., 64 Fed. Rep. 723.

[5] Interst. Com. Comn. *v.* Atchison, T. & S. F. R. Co., 149 U. S. 264.

CHAPTER XVIII.

UNITED STATES COMMISSIONERS.

Commissioners of the Circuit Courts Abolished.

§ 447. By the act of May 28, 1896, it is provided:

"SEC. 19. That the terms of office of all commissioners of the circuit courts heretofore appointed shall expire on the thirtieth day of June, eighteen hundred and ninety-seven; and such office shall on that day cease to exist, and said commissioners shall then deposit all the records and other official papers appertaining to their offices in the office of the clerk of the circuit court by which they were appointed. All proceedings pending, returnable, unexecuted or unfinished at said date before any such commissioner shall be continued and disposed of according to law by such commissioner appointed as herein provided, as may be designated by the district court for that purpose. It shall be the duty of the district court of each judicial district to appoint such number of persons, to be known as United States commissioners, at such places in the district as may be designated by the district court, which United States commissioners shall have the same powers and perform the same duties as are now imposed upon commissioners of the circuit courts. The appointment of such United States commissioners shall be entered of record in the district courts, and notice thereof at once given by the clerk to the Attorney-General. That such United States commissioners shall hold their offices, respectively, for the term of four years, but they shall be at any time subject to removal by the district court; and no person shall at any time be a clerk or deputy clerk of a United States court and a United States commissioner without the approval of the Attorney-General: *Provided*, That all acts and parts of acts applicable to commissioners of the circuit courts, except as to appointment and

fees, shall be applicable to United States commissioners appointed under this act. Warrants of arrest for violations of internal revenue laws may be issued by United States commissioners upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector or deputy collector of internal revenue, or revenue agent or private citizen, but no such warrant of arrest shall be issued upon the sworn complaint of a private citizen unless first approved in writing by a United States district attorney. That United States commissioners and all clerks of United States courts are hereby authorized to administer oaths.

"SEC. 20. That no marshal or deputy marshal, attorney or assistant attorney of any district, jury commissioner, clerk of marshal, no bailiff, crier, juror, janitor of any government building, nor any civil or military employee of the government, except as in this act provided, and no clerk or employee of any United States justice or judge shall have, hold or exercise the duties of the United States commissioner. And it shall not be lawful to appoint any of the officers named in this section receiver or receivers in any case or cases now pending or that may be hereafter brought in the courts of the United States."[1]

As the commissioners appointed under this act have the same powers and perform the same duties as the commissioners of the circuit courts whom they superseded, the two kinds of commissioners will, for convenience, be treated in the present chapter as identical.

The office of United States commissioner is quite an important one, as he has the authority in some cases to exercise functions which also belong to the highest judicial officers of the country.

We have already noticed that any district judge may appoint commissioners, before whom appraisers of vessels or goods and merchandise seized for breaches of any law of the United States may be sworn.[2] This seems to be the limit of their authority. But each circuit court could appoint, in the different districts in which it was held, as many discreet persons as it might deem necessary, to be called "commissioners of the circuit courts," who might exercise such powers as were or might be expressly

[1] Act of May 28, 1896, ch. 252, Stat. 1895-96, 184.

[2] Rev. Stat. §§ 570, 938.

conferred upon them.[1] But no marshal or deputy marshal of any of the courts of the United States was eligible to the office of commissioner of any of said courts.[2] And now, under the act of 1896, as has been said, United States commissioners are to be appointed by the district court of each judicial district. By section 24 of the above act its provisions with reference to commissioners, etc., do not apply to Indian Territory or Alaska.[3]

Under the provisions of the statutes the commissioners have various powers conferred upon them. They have equal authority with the judges of the Supreme Court and of the circuit and district courts to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States;[4] and they have power to enforce the awards or decrees of foreign consuls, vice-consuls or commercial agents, in cases where the latter lawfully sit as arbitrators of differences that arise between the captains and the crews of vessels belonging to the nation whose interests are committed to their charge.[5]

They may also hear the applications of poor convicts, to be relieved from imprisonment in certain cases, and determine the same;[6] and arrest foreign seamen upon the application of consular officers in certain cases.[7] They may also summon the master of a vessel to show cause why process should not issue against her to answer for the wages of seamen, upon a proper application therefor;[8] take depositions *de bene esse* in any civil cause depending in the circuit or district courts;[9] take bail affidavits when required in civil cases in said courts, and acknowledgments of the same;[10] administer oaths and take acknowledgments in certain cases, and certify the same;[11] issue search warrants to search premises, where there is the proper evidence that a fraud is being perpetrated against the revenue,[12] and warrants of arrest for violation of internal revenue laws.[13]

They have also further powers, which we will hereafter more

[1] Rev. Stat. § 627.
[2] Rev. Stat. § 628.
[3] And see Act of Feb. 19, 1897, ch. 265, 29 Stat. L. 538, 2 Supp. R. S. 557.
[4] Rev. Stat. § 727.
[5] Rev. Stat. § 728.
[6] Rev. Stat. §§ 1042, 5296.
[7] Rev. Stat. §§ 4080, 4081, 5280.
[8] Rev. Stat. §§ 4546, 4547.
[9] Rev. Stat. § 863.
[10] Rev. Stat. § 945.
[11] Rev. Stat. § 1778.
[12] Rev. Stat. § 3462.
[13] Act of May 28, 1896, *supra*.

particularly notice, such as to hear and determine the claim made for a fugitive from justice under an extradition treaty, but not until they are authorized so to do by some court of the United States. Besides this, bonds and stipulations may be taken in admiralty before any commissioner in certain cases provided for by Rule 5 in admiralty.

The statute conferring the power of appointing commissioners of the circuit courts made no provision for their removal; but the practice was for the courts to remove as well as appoint. It has, however, been held that a commissioner is not an officer of the court, and that the court in making the appointment only exercises an agency imposed on it, and does not acquire thereby a right to supervise his proceedings as an officer.[1] Now the United States commissioners are appointed for a term of four years, but are subject to removal at any time by the district court.[2]

Power of Commissioners to Require Security to Keep the Peace and for Good Behavior.

§ 448. Having referred in a general way to the powers of the commissioners, it will be appropriate to consider these powers more particularly, and furnish forms for their convenience. In reference to the power of commissioners to hold to security to keep the peace and for good behavior the statute provides: "The judges of the Supreme Court and of the circuit and district courts, the commissioners of the circuit courts and the judges and other magistrates of the several states, who are or may be authorized by law to make arrests for offences against the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognizable before them."[3]

[1] *Ex parte* John Van Orden, 3 Blatch. 166. Commissioners are in legal effect magistrates and in no sense administrative officials or assistants of the court: Dennison *v.* U. S., 25 Ct. Cl. 304. Their decisions, where they have jurisdiction, are not reviewable on habeas corpus in the circuit or Supreme courts: Stevens *v.* Fuller, 136 U. S. 468; *In re* Luis Oteiza y Cortes, *Ibid.* 330.

[2] Act of May 26, 1896, ch. 252, § 19.

[3] Rev. Stat. § 727.

Similar provisions are to be found in the statutes of most if not all of the states, which is perhaps sufficient evidence of their importance and wisdom. They are particularly efficacious in restraining treasonable attempts against the government.[1] The commissioner has under these provisions the same power in respect to the taking of bail or security that a state magistrate would have in similar cases, and no more. Thus, where a commissioner, at the request of a prisoner, adjourned his examination for nineteen days, in a case where the latter was charged with a violation of the revenue laws, and took bail for his appearance at the end of that time, when the magistrate of the state could under such circumstances adjourn the case only ten days, in a suit against his sureties on the bond for a breach of it, it was held that the prisoner could not by consent confer the right to adjourn for that time, nor estop the sureties from setting up the invalidity of it.[2]

There Must be an Information or Complaint.

§ 449. The general practice in the several states where cognizance is given the state courts or officers in such cases is followed in cases presented to commissioners and the federal judges. This must necessarily be by information or complaint under oath, or by a personal examination of the complaining party, and such others as may be produced, showing that some one threatens to commit or is about to commit some offence arising under the Constitution or laws of the United States. In such cases it must appear that there is at least probable cause to believe that the offence will be committed unless the party charged is restrained by the action of the magistrate; and it would not be proper for him to issue a warrant for the arrest on the mere motion of the commissioner or other officer.[3]

Proceedings on Examination.

§ 450. The usual proceeding on examination of similar cases before state magistrates is followed when they are before federal

[1] United States *v.* Greiner, 4 Phila. 396.

[2] United States *v.* Case, 8 Blatch. 250; United States *v.* Rundlet, 2 Curt. 44; United States *v.* Horton's Securities, 2 Dill. 94; United States *v.* Goldstein, 1 Dill. 413.

[3] Johnson *v.* Tompkins, Bald. 571; United States *v.* Shepherd, 1 Abb. 431.

magistrates. When the party charged is brought before him, the witnesses may be examined both on the part of the government and of the party accused. If from the evidence the magistrate believes that there is good reason to fear the commission of the offence by the accused, and that it arises under the Constitution and laws of the United States, he should be held to answer before the proper tribunal, and give a proper recognizance therefor, with sureties to be approved by the commissioner, and further that he will in the meantime keep the peace and be of good behavior toward all citizens of the United States, and particularly towards the one complaining in that behalf.

Recognizance of Witnesses.

§ 451. "Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offence against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance with or without sureties, in his discretion, for his appearance to testify in the case. And where the crime or offence is charged to have been committed upon the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused whose testimony in his opinion is important, and is in danger of being otherwise lost."[1]

When the Prisoner must be Committed; Duty of the Commissioner to make a Return.

§ 452. If a recognizance is required and given by the prisoner he should be discharged, but if not he should be committed to prison until he furnishes the same, and the mittimus or warrant of commitment should, as is usually required in such cases in proceedings before state officers, show the cause of the commitment and the amount of security necessary for his discharge.

It would be the duty of the commissioner to make a return of the recognizance if one is given, and of all the papers and pro-

[1] Rev. Stat. §§ 848, 879, 1014. In Vermont all recognizances for the appearance of witnesses in such cases must be to the next term of the circuit court to be held in the district: Rev. Stat. § 880.

cess, to the proper court, where the prisoner is required to appear on or before the first day of the next term of the same.

Commissioners may Enforce Awards of Consuls, etc., in Certain Cases.

§ 453. The statute provides for the enforcement of the awards or decrees of consuls and other agents of foreign countries. It is as follows: "The district and circuit courts and the commissioners of circuit courts shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice-consul or commercial agent of any foreign nation, made or rendered by virtue of any authority conferred upon him as such consul, vice-consul or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of vessels belonging to the nation whose interests are committed to his charge; application for the exercise of such power being first made to such court or commissioner by petition of such consul, vice-consul or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States until such award, arbitration or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice-consul or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice-consul or commercial agent: *Provided, however*, that the expenses of the said imprisonment and maintenance of the prisoners and the cost of the proceedings shall be borne by such foreign government or by its consul, vice-consul or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process and do all other acts necessary and proper to carry into effect the premises under the authority of said courts and commissioners."[1]

[1] Rev. Stat. § 728.

Offenders Against the United States; When Arrested by Commissioners.

§ 454. Section 1014 provides: "For any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, the chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate of any state where he may be found, and *agreeably to the usual mode of process against such offenders in such state*, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offence is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."[1] By later statutes it is made the duty of the marshal, his deputy or other officer who may arrest a person charged with any crime or offence, to take the defendant before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating these provisions.[2]

[1] See also Rev. Stat. §§ 848, 879.

[2] Act of Aug. 18, 1894, ch. 301, par. 21, 28 Stat. L. 372, etc., 2 Supp. R. S. 259; act of March 3, 1893, ch. 208, par. 19, 27 Stat. L. 572, etc., 2 Supp. R. S. 123. So complaints for violation of the Indian Territory liquor law are to be made before the nearest commissioner: act of July 23, 1892, ch. 234, 27 Stat. L. 260, 2 Supp. R. S. 45.

Usual Mode of Procedure Against Offenders in the State Courts Pursued.

§ 455. The words "usual mode of process against offenders," used in the statutes, are synonymous with usual mode of proceedings; and the mode of proceedings should in all cases conform to the usual practice and procedure in like cases in the courts of the state where the proceedings shall take place.[1] The authority granted to the judicial officer in these cases is not one which can be exercised in any arbitrary manner which he may see fit to prescribe or adopt, but it must be exercised in the same manner as that pursued against offenders in similar cases under the laws of the state where the prosecution is instituted.[2]

Information or Complaint Under Oath.

§ 456. The mode of procedure in the state courts on preliminary examinations is generally, if not universally, prescribed by the statutes of the various states. There must be at least a probable cause to believe that an offence has been committed against the United States, before the magistrate can properly issue a warrant for the arrest of an offender, and the requisite proof on which to base his conclusion must be an information or complaint, setting forth the necessary facts to constitute the offence charged, supported by oath.[3] But it is not necessary that the application for the warrant should be made by the district attorney. Any person may make the complaint under oath.[4] A warrant for the arrest should not, however, be issued upon the affidavit of a person who has no personal knowledge of the commission of the offence, and who only states that he has been informed of it, and believes the information to be true.[5]

[1] United States *v.* Rundlet, 2 Curt. 41; United States *v.* Horton's Securities, 2 Dill. 94. This provision is, however, subordinate to the declaration of the Constitution that all warrants must particularly describe the person to be seized: West *v.* Cabell, 153 U. S. 78, 87. But a warrant issued by a commissioner is not void for the want of a seal, the commissioner having no seal and not being required by statute to affix one to warrants issued by him: Stair *v.* U. S., 153 U. S. 614.

[2] Bagnall *v.* Ableman, 4 Wis. 163; United States *v.* Clark, 1 Gallis. 497; *In re* Robert M. Martin, 5 Blatch. 303.

[3] United States *v.* Bollman, 1 Cr. (C. C.) 373.

[4] United States *v.* Skinner, 2 Wheel. Cr. Cas. 232.

[5] *In re* Commissioners, 3 Woods 502; United States *v.* Burr, 2 Wheel. Cr. Cas. 573.

It is not essential that the complaint be signed and verified before the commissioner, but it should be verified before some one authorized to administer oaths.[1] Nor need it follow the exact language of the statute in charging the offence.[2] This is in conformity with the current of decisions of the state courts upon the same point.

The form of the complaint should be that required by the statutes of the state for similar cases under state laws, if any, or, in the absence of this, such as may have been approved by the general practice in the state.[3]

The warrant of arrest, if issued, should, with the necessary subpœnas on behalf of the United States, be placed in the hands of the United States marshal of the proper district or his deputy, who should serve and return them in the usual manner provided by the state law.[4]

Notice to the District Attorney.

§ 457. It is not imperatively required to give notice of such proceedings to the district attorney, but it is very proper to do so after the filing of the complaint, where it is convenient or practicable, as the government is the party interested in the prosecution. If he appears it can be only as counsel for the government; and he cannot direct the commissioner what course he shall pursue or what finding he shall make, nor can he dismiss the proceedings.[5]

Preliminary Hearing; Witnesses.

§ 458. At the hearing of the cause the course of procedure would be the same as in a like case under the practice of the state, and similar to that suggested in case of a prosecution to require security to keep the peace and for good behavior.[6] The

[1] *Ex parte* Bollman, 4 Cr. 75; Burr's Trial 14.

[2] United States *v.* Hand, 6 McLean 274.

[3] United States *v.* Rundlet, 2 Curt. 41; United States *v.* Horton's Securities, 2 Dill. 94.

[4] Rev. Stat. §§ 787, 788. It is a common practice to insert the names of all the witnesses in one subpœna, and this is the most convenient way.

[5] United States *v.* Schumann, 2 Abb. (C. C.) 523. In some of the circuits there is a rule requiring notice to be given the district attorney in revenue cases: Rules 13 and 61, 8th circuit.

[6] See *ante*, § 451. A preliminary examination before a commissioner is not a case pending in any court of the United States, within the meaning of Rev. Stat. § 5406: Todd *v.* U. S., 158 U. S. 278.

accused may be represented by counsel and examine witnesses in his own behalf;[1] but the magistrate cannot issue process to summon witnesses for him in another state.[2]

The statute provides that in no case shall the fees of more than four witnesses be taxed against the United States in the examination of a criminal case before a commissioner of a circuit court, unless their materiality and importance are first approved and certified to by the district attorney for the district in which the examination is had, and such taxation is subject to revision as in other cases.[3]

If the magistrate adjourns a cause to a future time it must be in accordance with the state law and practice on that subject, and it cannot be for an indefinite time.[4] If the statutes of the state provide for giving bail in such cases, bail may be taken for the appearance of the accused at the time fixed;[5] but if no bail is given he should be committed.

The accused may be committed by the commissioner although the grand jury of the trial court in such cases is in session, and even although an indictment found against the accused for the offence charged has been quashed.[6] It may further be observed that whether the commissioner commits or discharges the accused it is not a final bar to further proceedings. If he is discharged he may be again arrested for the same offence, and may be held to bail or committed on sufficient evidence. If committed, as we shall hereafter more fully notice, he may apply to the proper court for a reduction of the bail fixed by the commissioner, or the prosecuting officer may apply to the court to have it increased, or even to discharge the prisoner altogether. The prisoner may also procure a discharge in a proper case on *habeas corpus*.

[1] United States *v.* Bollman, 1 Cr. (C. C.) 373.

[2] United States *v.* White, 2 Wash. 29. The power to hear implies the power to adjourn, both as to time and place: United States *v.* Rundlet, 2 Curt. 41.

[3] Rev. Stat. § 981.

[4] United States *v.* Worms, 4 Blatch. 332.

[5] United States *v.* Horton's Securities, 2 Dill. 94; United States *v.* Rundlet, 2 Curt. 41. The form of the bail-bond should conform as far as possible to that required by state law: U. S. *v.* Sauer, 73 Fed. Rep. 671.

[6] United States *v.* Burr, 1 Burr's Trial 79; United States *v.* Townmaker, Hemp. 299; United States *v.* Smith, 2 Cr. (C. C.) 111.

The commissioner's order in such a case is not in the nature of a final judgment.[1]

Witness Fees; How Paid.

§ 459. Witnesses are allowed for each day's attendance in court or before any officer pursuant to law one dollar and fifty cents, and five cents a mile each way in going from his place of residence to the place of trial or examination and in returning to his place of residence. An affidavit of his attendance and a statement of his claim therefor should be made out and sworn to before the commissioner, who should certify to the attendance, and order the proper marshal of the district to pay the claim.[2]

Decision of the Magistrate; Commitment.

§ 460. If after hearing the evidence the commissioner believes that an offence against the United States has been committed, and that the accused is guilty thereof, he should so find, and by an order commit him to prison to await any indictment which may be found in the proper court against him, unless the offence is bailable and he furnish good and sufficient bail for his appearance at said court; and if he fails at the time of the decision to furnish a proper recognizance in such cases, in a sum to be fixed by the commissioner, the commissioner should issue a warrant of commitment.[3] We shall hereafter notice what causes are and what are not bailable before a commissioner.

Waiver of Examination.

§ 461. The accused can of course appear before the commissioner at any time after complaint is filed and waive an examination, and give a recognizance the same as if he had been held to

[1] United States *v.* Burr, 1 Burr's Trial 11, 79; *In re* Robert M. Martin, 5 Blatch. 303.

[2] Rev. Stat. § 848. If a witness is detained in prison for want of security for his appearance, he is entitled to a compensation of one dollar a day: Rev. Stat. § 848. The marshal is required to pay witness on behalf of the United States, on the order of the court: Rev. Stat. § 855.

[3] Anon., 1 Wool. 422; United States *v.* Bloomgart, 2 Ben. 356; *In re* Samuel R. Van Campen, *Ibid.* 419; *In re* Robert M. Martin, 5 Blatch. 303; United States *v.* Burr, 1 Burr's Trial 11. The commissioner has no power to hear and determine any matter: he has only to decide whether there is probable cause to believe that an offence has been committed and cannot pass upon the credibility of testimony or find any fact: U. S. *v.* Hughes, 70 Fed. Rep. 972.

bail for his appearance after an examination. This is the practice in the state courts; and of course it could not be construed into any confession of guilt of the accused.

The warrant of commitment should in all cases show on its face a sufficient cause of commitment.[1] If it does not set forth an act that is made an offence against the United States it would be void,[2] and the prisoner discharged on *habeas corpus*.

Removal of Prisoner to Another District.

§ 462. The section under consideration provides that, where any offender is committed in any district other than that where the offence is to be tried, it is the duty of the judge of the district where such offender is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.[3] Under this provision a party who has committed an offence against the United States in the District of Columbia may be arrested and examined elsewhere, and, if held for trial, may be removed to said district for trial.[4] But it does not apply to an arrest made for the purpose of extradition to a foreign country.[5] The removable offences under this section are the same as under section 33 of the Judiciary Act, including only federal offences, created by the general legislation of Congress, and not such an offence as libel.[6]

Significance of the Word "Seasonably."

§ 463. The accused is entitled to a reasonable opportunity to procure bail, and the statute does not authorize his removal under the last clause of the section until he has been imprisoned for the want of bail; that is, for his failure to enter into a recognizance for his appearance at the proper court. After this it is the duty of the judge of the district where the offender is im-

[1] *Ex parte* Thomas Williams, 4 Cr. (C. C.) 343; *Ex parte* N. V. H. Bennett, 2 *id.* 612; *Ex parte* Burford, 3 Cr. 448; *Ex parte* Robert Sprout, 1 Cr. (C. C.) 424; United States *v.* Brown, 4 *id.* 333.

[2] Bagnall *v.* Ableman, 4 Wis. 163.

[3] See also Rev. Stat. § 879, as to the recognizance which may be required of witnesses: United States *v.* Haskins, 3 Saw. 262. The prisoner is entitled to notice and, if he desires it, to be brought before the judge for the purpose of presenting any objections he may have to the making of the order of removal: *In re* Beshears, 79 Fed. Rep. 70.

[4] *In re* Augustus C. Buel, 3 Dill. 116.

[5] *In re* Philip Henrich, 5 Blatch. 414.

[6] *In re* Dana, 68 Fed. Rep. 886.

prisoned, and where he must be tried in another district, to *seasonably* issue his warrant for his removal to the district where the trial is to be had. "Nothing is to be done rashly or in haste or malice. A man is not to be snatched from his home on the instant and carried into a distant state. But a season is to be allowed at least to procure bail if not to arrange for his departure, and this season is to be allowed after his arrest, examination, the fixing of the amount of bail, and imprisonment for delinquency in not giving it."[1]

The commissioner has the same power to take bail as a state magistrate in a similar case; and although the prisoner is in the hands of a marshal awaiting a warrant for his removal to another district from the district judge, it appears that the commissioner may still release him at any time before the issuing of the warrant, on his entering into a proper recognizance for his appearance as required by the order of the commissioner.[2]

Amount of Bail; What the Recognizance Should Contain.

§ 464. The word bail, in the statutes, means the taking of security for the appearance of the accused party at the proper court and at the proper time; and this must not be excessive. What would be large bail in one case would perhaps not be large in another. The judgment of the court or magistrate in fixing the amount of bail should be guided by a reasonable consideration of the ability of the prisoner to give bail and the atrocity of the offence; always bearing in mind that the object in requiring bail is to secure the personal attendance of the accused at the proper court, to answer to any indictment which may be found against him for the offence charged.[3]

The bail to be given is a recognizance or bond with sureties. This should recite the act or offence with which the principal is charged; and if from the recital of the act or offence charged it appears that it does not in fact show any offence against the United States, or any violation of an act of Congress, it is void and the sureties are not bound thereby. But it is sufficient if it

[1] Bagnall *v.* Ableman, 4 Wis. 163.

[2] United States *v.* Horton, 2 Dill. 94; United States *v.* Voltz, 14 Blatch. 15.

[3] United States *v.* Lawrence, 4 Cr. (C. C.) 518; United States *v.* Case, 8 Blatch. 250; *Ex parte* George Milburn, 9 Pet. 704.

sets forth an act punishable by a statute of the United States, although without any particulars.[1]

Extent of Liability of Sureties.

§ 465. A recognizance which requires the accused to appear in the proper court and attend from day to day to answer the charge made against him is not discharged by the quashing of an indictment which may be found against him; for another indictment may still be found during the term, for the same offence, and free from the objections to the former one; but if the court finally adjourns without taking any action against him on the charge, he and his sureties are discharged.[2]

If the recognizance stipulates for the appearance of the accused at the next term of the proper trial court and at any subsequent term of said court to be thereafter held, this means only such subsequent term as may follow in regular succession in the course of business of the court, and an agreement at any term to continue the case for an indefinite period would discharge the sureties.[3] But if the accused, after giving the recognizance, should be arrested, convicted and imprisoned under the state laws, such proceeding and imprisonment would be no excuse for his non-appearance, nor exonerate the bail from their obligation to produce him; nor would the death of the accused after default and forfeiture of the recognizance relieve them from their liability.[4]

Copies of Process to be Returned to the Proper Court.

§ 466. Whenever a court of the United States in the district where the examination takes place, or in some other district, within or without the state, has by law cognizance of the offense charged, and for which the accused is held to bail or committed, it becomes the duty of the commissioner to return, as speedily

[1] United States *v.* Hand, 6 McLean 274; United States *v.* Dennis, 1 Bond 103.

[2] United States *v.* White, 5 Cr. (C. C.) 368; United States *v.* Burr, 1 Burr's Trial 79.

[3] Reese *v.* United States, 9 Wall. 13.

[4] United States *v.* Van Fossen, 1 Dill. 406. Bail, in cases where the punishment may be death, cannot be taken by a commissioner: Rev. Stat. § 1016. A party accused and admitted to bail may be arrested by his bail at any time and delivered to the marshal or his deputy, before the commissioner, and be exonerated: Rev. Stat. § 1018. So better security may be required: *Ibid.* § 1019.

as may be, copies of the *process*, together with the recognizances taken, to the clerk of the proper court.

The word *process*, as here used, undoubtedly means proceedings in the case until the determination of it by the order or judgment of the magistrate. This, then, would embrace the information or complaint, with its verification, and a statement of the proceedings before the commissioner and his action thereon, and the recognizance of the accused or the warrant of commitment, as the case may be, and the original recognizances of the witnesses for their appearance to testify in the case. These should be duly certified by the commissioner.[1]

The mode and scope of the return in such cases has been the subject of regulation by rule of some of the circuit courts, perhaps most of them.

Provisions for the Discharge of Poor Convicts.

§ 467. Provision is made by the Revised Statutes for the discharge from prison of poor convicts who have been sentenced to pay a fine, or fine and costs. Section 1042 provides as follows: "When a poor convict, sentenced by any court of the United States to pay a fine, or fine and costs, whether with or without imprisonment, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and costs, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence and be heard, the commissioner shall proceed to hear and determine the matter, and if on examination it shall appear

[1] The state laws control under Rev. Stat. § 1014, only as to all questions of procedure before a commissioner up to the time when the proceedings are certified to the court having jurisdiction of the offence. In enforcing a bond or recognizance duly returned by a commissioner or other committing magistrate, the United States courts may resort to common law remedies, such as a *sci. fa.* or an original action: U. S. *v.* Insley, 12 U. S. App. 125. The transcript of the commissioner will be presumed, in the absence of evidence to the contrary, to have been properly filed in the clerk's office of the court below: Hunt *v.* U. S., 19 *id.* 683. His findings are *prima facie* correct and, when they are sustained by the circuit court, will not be overruled unless they are without testimony to support them or the preponderance of evidence is greatly against his conclusion: Gay Manufg. Co. *v.* Camp, 25 *id.* 134.

to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of [state where the oath is administered]; and that I have no property in any way covered or concealed, or in any way disposed of, for future use and benefit. So help me God.' And thereupon such convict shall be discharged, the commissioner giving to the jailor or keeper of the jail a certificate setting forth the facts." [1]

In construing this section it has been held that a poor convict is entitled to be released under its provisions, although he has been given a pardon on condition that he pay a fine and costs. [2]

Commissioners' Power to Arrest Foreign Seamen, in Case of Controversies, etc., at Sea.

§ 468. Section 4079 of the Revised Statutes provides that "whenever it is stipulated by treaty or convention between the United States and any foreign nation that the consul-general, consuls, vice-consuls or consular or commercial agents of each nation shall have exclusive jurisdiction of controversies, difficulties or disorders arising at sea or in the waters or ports of other nations, between the master or officers and any of the crew, or between any of the crew themselves, of any vessel belonging to the nation represented by such consular officer, such stipulation shall be executed and enforced within the jurisdiction of the United States as hereinafter declared. But before this section shall take effect as to the vessels of any particular nation having such treaty with the United States, the President shall be satisfied that similar provisions have been made for the execution of such treaty by the other contracting party, and shall issue his proclamation to that effect, declaring this section to be in force as to such nation."

Section 4080 provides: "In all cases within the purview of the

[1] See also §§ 847, 5296.

[2] *In re* Manual Ruhl, 5 Saw. 186.

preceding section, the consul-general, consul or other consular or commercial authority of such foreign nation, charged with the appropriate duty in the particular case, may make application to any court of record of the United States, or to any judge thereof, or to any *commissioner of a circuit court*, setting forth that such controversy, difficulty or disorder has arisen, briefly stating the nature thereof and when and where the same occurred, and exhibiting a certified copy, extract of the shipping articles, roll or other proper paper of the vessel, to the effect that the person in question is of the crew or ship's company of said vessel; and further stating and certifying that such person has withdrawn himself, or is believed to be about to withdraw himself, from the control and discipline of the master and officers of the vessel, or that he has refused, or is about to refuse, to submit to and obey the lawful jurisdiction of consular or commercial authority in the premises; and further stating and certifying that, to the best of the knowledge and belief of the officer certifying, such person is not a citizen of the Untited States. Thereupon such court, judge or commissioner shall issue his warrant for the arrest of the person so complained of, directed to the marshal of the United States for the appropriate district, or in his discretion to any person, being a citizen of the United States, whom he may specially depute for the purpose, requiring the person to be brought before him for examination at a certain time and place."

Section 4081 provides: "If on such examination it is made to appear that the person so arrested is a citizen of the United States, he shall be forthwith discharged from arrest and shall be left to the ordinary course of law. But if this is not made to appear, and such court, judge or commissioner finds, upon the papers heretofore referred to, a sufficient *primâ facie* case that the matter concerns only the internal order and dicipline of such foreign vessel, or, whether in its nature civil or criminal, does not affect directly the execution of the laws of the United States, or the rights and duties of any citizen of the United States, he shall forthwith, by his warrant, commit such person to prison, where prisoners under sentence of a court of the United States may be lawfully committed, or, in his discretion, to the master or chief officer of such foreign vessel, to be subject to the lawful orders, control and discipline of such master or chief officer, and to the jurisdiction of

the consular or commercial authority of the nation to which such vessel belongs, to the exclusion of any authority or jurisdiction in the premises of the United States or of any state thereof. No person shall be detained more than two months after his arrest, but at the end of that time shall be set at liberty, and shall not again be arrested for the same cause. The expenses of the arrest and detention of the person so arrested shall be paid by the consular officers making the application."

For forms required under the provisions of the foregoing section, the forms furnished in connection with the treatment of other powers and duties of commissioners may be consulted. The application, warrant of arrest and warrant of commitment are all similar in their formal parts.

Commissioners' Authority in Certain Cases to Arrest Deserting Foreign Seamen.

§ 469. Authority is conferred upon commissioners of the circuit courts, as well as other officers, in certain cases to arrest seamen deserting from foreign vessels.

Section 5280 of the Revised Statutes provides as follows: "On application of a consul or vice-consul of any foreign government having a treaty with the United States, stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice or other magistrate having competent power to issue warrants to cause such person to be arrested for examination. If on examination the facts stated are found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserter shall be found to have committed any crime or offence, his surrender may be delayed

until the tribunal before which the case shall be depending or may be cognizable shall have pronounced its sentence, and such sentence shall have been carried into effect."[1]

Commissioners may Summon Masters of Vessels in Certain Cases, for Non-Payment of Wages.

§ 470. The statutes provide that whenever the wages of any merchant seaman are not paid within ten days after the time when the same ought to be paid, or any dispute arises between the master of a vessel and the seamen of the same touching wages, the district judge of the judicial district where the vessel is, or in case his residence be more than three miles from the place, or he be absent from the place of his residence, then any judge or justice of the peace, or any commissioner of a circuit court, may summon the master of such vessel to appear before him, to show cause why process should not be issued against such vessel, her tackle, apparel and furniture, according to the course of admiralty courts, to answer for the wages.[2]

It follows from the foregoing that some written application should be made by the party or parties seeking the recovery of wages, who should set forth therein the facts and circumstances which would give the commissioner jurisdiction of the case, including either the absence of the district judge from the place of his residence, if he resides where the vessel is, or if he resides more than three miles from that place, that fact should appear to give the commissioner jurisdiction. The application should be signed by the applicant and sworn to before the commissioner or other person authorized to administer oaths.[3]

The summons may be in the usual form. If the master against whom the summons is issued neglects to appear, or if appearing he does not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, it is the duty of the commissioner to forthwith

[1] See also Rev. Stat. §§ 4079, 4081.

[2] Rev. Stat. § 4546.

[3] For construction of this provision and the following section, see Steamboat Thomas Jefferson, 10 Wh. 428; The Cypress, Blatch. & H. 83; Freeman *v.* Baker, *Ibid.* 372; The Schooner David Faust, 1 Ben. 183; Whitman *v.* The Ship Neptune, 1 Pet. Ad. 183; Collins *v.* Nickerson, Sprague 126; Kief & Lang *v.* The Steamboat London, Newb. 6; The Schooner Eagle, Olc. 232.

certify to the clerk of the district court that there is sufficient cause of complaint whereon to found admiralty process; and thereupon it becomes the duty of the clerk of such court to issue process against the vessel, and the suit will proceed in the court and a final judgment be given according to the usual course of admiralty practice in such cases.[1]

If the master makes a defence to the application, the magistrate is required to hear it. He may make and verify, under oath, statements in opposition to the claims and demands of the seamen; and the commissioner may, for good cause shown, adjourn the cause for a reasonable time. But it is not expected that a commissioner will enter into any very critical or protracted examination of such cases, nor is he required to decide difficult questions.[2] It seems that his certificate should show that either the district judge was absent or resided more than three miles from the vessel.[3]

Commissioners; Appointment and Powers Under Statutes Relating to Equal Civil Rights.

§ 471. Chapter 7 of Title 70 of the Revised Statutes makes provision for securing the elective franchise and civil rights to citizens. The more effectually to secure these rights and to punish offenders, and those guilty of violating the rights of persons secured by these provisions, section 1982 of the Revised Statutes provides that the district attorneys, marshals and deputy marshals, the commissioners appointed by the circuit and territorial courts, are authorized and required, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of said chapter, and to cause such persons to be prosecuted.[4]

Another section further provides that the circuit courts of the United States and the district courts of the territories, from time to time, shall increase the number of commissioners so as to afford a speedy and convenient means for the arrest and examination of persons charged with the crimes above referred to; and

[1] Rev. Stat. § 4547.

[2] 5 Conk. Ad., Pr. 56. See also Oliver *v.* Alexander, 6 Pet. 143; The Trial, Blatch. & H. 94.

[3] The Steamboat London, Newb. 6.

[4] Rev. Stat. Tit. 24, p. 347, §§ 1977 to 1991, inclusive. See also Act of March 1, 1875, ch. 114, § 3, 18 Stat. L. 335, 1 Supp. R. S. 68.

they are authorized and required to exercise all the powers conferred in reference thereto in the same manner as they are authorized to exercise them in reference to other offences against the laws of the United States.[1]

They are further authorized to appoint in writing one or more suitable persons, from time to time, to execute all such warrants or other process as the commissioners may issue in the lawful performance of their duties, and have power to call to their aid the bystanders or *posse comitatus* of the proper county, or so much of the land or naval force of the United States or of the militia as may be necessary to the performance of the duty with which they are charged.[2] The power of the circuit court to appoint one of its commissioners supervisor of elections has been abolished.[3]

Bail and Affidavits in Civil Causes May be Taken by Commissioners, and Stipulations in Admiralty.

§ 472. Section 945 provides that bail and affidavits, when required in any civil cause in any circuit or district court, may be taken by a commissioner of the circuit court for the district; and such acknowledgments of bail and affidavits have the same effect as if taken before any judge of such courts.[4] Rule 5 in admiralty also provides that bonds or stipulations in admiralty suits may be given and taken before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.[5]

[1] Rev. Stat. § 1983.

[2] Rev. Stat. § 1984. See also Rev. Stat. § 5516. Section 1987 provides for an allowance of fees by the commissioners to persons executing process.

[3] See Act of Feb. 8, 1894, ch. 25, 28 Stat. L. 36, 2 Supp. R. S. 171, repealing all statutes relating to supervisors of elections and special deputy marshals.

[4] A commissioner has authority under this provision to take affidavits to papers in civil proceedings for the arrest of a debtor in conformity with state laws: Fulton *v.* Gilmore, 10 C. L. N. 108.

[5] But he cannot authenticate a bond or stipulation in admiralty by reciting that the sureties appeared before him and bound themselves, etc., when in fact they never signed the obligation: Sawyer *v.* Oakman, 11 Blatch. 65.

Commissioners May Take Depositions de Bene Esse.

§ 473. The testimony of any witness may be taken in any civil cause depending in any district or circuit court by deposition *de bene esse* before any commissioner of a circuit court when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial before the time of trial, or when he is ancient and infirm.[1] The conditions which must exist in order to authorize the taking of the deposition *de bene esse* are: 1st, that the witness lives at a greater distance from the place of trial than one hundred miles; 2d, or that he is bound on a voyage to sea; 3d, or about to go out of the United States; 4th, or about to go out of such district to a greater distance from the place of trial than one hundred miles before the time of trial; 5th, or is ancient and infirm.[2]

The taking of depositions *de bene esse* is in derogation of the rules of common law, and, therefore, the statutory provisions authorizing it are strictly construed. Hence, before such depositions can be used it is necessary to show that the statutory provisions have been strictly complied with.[3] If one deposition has been taken, yet another may be taken of the same witness;[4] and they may be taken outside the limits of the district as well as within the district where the trial is had.[5] But the mere fact that a witness is about to depart from the state, or liable to be ordered out of the reach of a subpœna, is no reason for taking his deposition *de bene esse*.[6] Now, by the Act of March 9, 1892, it is provided that in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the

[1] Rev. Stat. § 863.

[2] Harris *v.* Wall, 7 How. 693; Whitney *v.* Hunt, 5 Cr. (C. C.) 120. The statute does not apply to cases pending in the Supreme Court: The Ægo, 2 Wh. 287; The London Packet, *Ibid.* 371.

[3] Bell *v.* Morrison, 1 Pet. 351; Harris *v.* Wall, 7 How. 693; Evans *v.* Eaton, 7 Wh. 356.

[4] Cornell *v.* Williams, 20 Wall. 226.

[5] Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604.

[6] The Samuel, 1 Wh. 9; Harris *v.* Wall, 7 How. 693.

depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held.[1]

Reasonable Notice Must be Given.

§ 474. The statute further provides that reasonable notice must be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, which notice must state the name of the witness and the time and place of the taking of his deposition. In cases *in rem* the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and shall direct.[2]

The service of the notice, whether on the party or his attorney, should be personal, and a service by leaving a copy at his dwelling-house or usual place of business is not authorized.[3]

A Party may Waive his Rights.

§ 475. Although as a general rule the statute providing for the taking of depositions must be strictly pursued, yet if there should be a failure so to do, a party for whose benefit the provisions were intended may waive his right to the same. Thus, if he should appear and cross-examine witnesses at the taking of depositions, or should consent that depositions might be taken at a certain time and place, this would be a waiver of the notice required by the provisions of the statute, and he could not object to the depositions thus taken without a formal notice.[4]

[1] Act of March 9, 1892, ch. 14, 27 Stat. L. 7, 2 Supp. R. S. 4. And see notes to Rev. Stat. §§ 863, etc., in chapter on evidence *infra*.

[2] Rev. Stat. § 863.

[3] Carrington *v.* Stimpson, 1 Curt. 437. If the notice is not reasonable the deposition cannot be read; but an hour's notice may be sufficient: Jameson *v.* Willis, 1 Cr. (C. C.) 566; Leiper *v.* Bickley, *Ibid.* 29; Bowie *v.* Talbot, *Ibid.* 247.

[4] Shutte *v.* Thompson, 15 Wall. 151; York Company *v.* Central Railroad Co., 3 *id.* 113; United States *v.* One Case of Hair Pins, 1 Paine 400; Sage *v.* Tauszky, 6 Cent. L. J. 7. Motions to suppress depositions for irregularities should be made before the case is called for trial so that

The notice should contain the title of the cause and the name or names of the witnesses proposed to be examined;[1] and if a deposition should be taken without the required notice, it may be taken again on the required notice.[2]

Mode of taking Depositions de Bene Esse.

§ 476. The statute further provides as to the mode of taking depositions *de bene esse*, that the person deposing shall be cautioned and sworn to testify the whole truth, and be carefully examined; that his testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person; and that it shall after it has been reduced to writing be subscribed by the deponent.[3]

The witness should be sworn to tell the whole truth as far as he knows it respecting the matter in controversy;[4] and if he is properly sworn it is not necessary that he should be otherwise cautioned.[5] If there is a statutory form of oath at the place where the deposition is taken, that may be followed; but if the witness has scruples against the usual form of oath, he may take that form which he regards as binding on his conscience, which the commissioner can duly certify.[6]

Transmission of Depositions to the Court.

§ 477. The statute further provides for the transmission of the deposition to the proper court. The magistrate taking it is required to retain it until he shall deliver it with his own hand into the court for which it was taken, or until it shall be sealed up by him and directed to such court; and it must remain under his seal until opened in court.[7]

opportunity may be afforded to correct the defects or to retake the testimony. A slight variance between the notice and the commission will not be fatal: Bibb *v.* Allen, 149 U. S. 481.

[1] Claxton *v.* Adams, 1 McArthur 496; Carrington *v.* Stimpson, 1 Curt. 437.

[2] Goodhue *v.* Bartlett, 5 McLean 186.

[3] Rev. Stat. § 864.

[4] Wilson Sew. Mach. Co. *v.* Jackson, 1 Hugh. 295; Shutte *v.* Thompson, 15 Wall. 151; United States *v.* Smith, 4 Day 121; Garrett *v.* Woodward, 2 Cr. (C. C.) 190.

[5] Moore *v.* Nelson, 3 McLean 383; Brown *v.* Platt, 2 Cr. (C. C.) 253.

[6] Wilson Sewing Machine Co. *v.* Jackson, 1 Hugh. 295.

[7] Rev. Stat. § 865.

What must Appear before the Deposition can be Used.

§ 478. Unless it appears to the satisfaction of the court at the time it is proposed to use the deposition that the witness is dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment he is unable to travel and appear at court, such deposition cannot be used in the cause.[1]

The Deposition must be Reduced to Writing by the Commissioner or the Witness.

§ 479. A deposition cannot be read in evidence unless it be shown that it was reduced to writing by the commissioner himself, or by the witness in his presence.[2] It would be good, however, if the commissioner should certify that it was reduced to writing by himself and the witness in his presence.[3] But the magistrate cannot authorize any one but the witness to reduce the testimony to writing;[4] it must be signed by the witness, or it cannot be read in evidence.[5] Each interrogatory should be at least substantially answered, otherwise it may be fatal to the deposition;[6] and the same rule prevails which governs on the oral examination of a witness on a trial, in reference to compelling the answer of witnesses.[7]

Certificate of the Commissioner to Deposition.

§ 480. The commissioner or other magistrate should attach to the deposition his certificate of the reasons for taking it, and the notice, if any, given to the adverse party.

The certificate will be *prima facie* evidence of the official character of the magistrate, if accompanied by the usual authentication of such papers before him. The facts calling for the exercise of the authority should appear upon the face of the instrument, and not be left to parol proof.

The return should show that he administered the oath to the witness, and where the deposition was taken, so that it may

[1] *Ibid.*

[2] Cook *v.* Burnley, 11 Wall. 659; Bell *v.* Morrison, 1 Pet. 351.

[3] Bussard *v.* Catalino, 2 Cr. (C. C.) 421.

[4] Marston *v.* McRea, Hemp. 689.

[5] Thorpe *v.* Simmons, 2 Cr. (C. C.) 195.

[6] Hurst *v.* McNeil, 1 Wash. (C. C.) 70; Winthrop *v.* Ins. Co., 2 *id.* 7; Dodge *v.* Israel, 4 *id.* 323.

[7] *In re* Judson, 3 Blatch. 148.

appear that the direction of the commissioner was complied with, and that it was taken in conformity with the notice given, if any; and that the witness lived more than one hundred miles from the place of trial, or some other ground for taking the deposition; and that he or the witness reduced the testimony to writing, and if the latter, that it was done in his presence; and any paper or document given in evidence or annexed to the deposition as a part of the testimony should be duly authenticated.[1]

The certificate of the officer who took the deposition that the witness lived more than one hundred miles from the place of trial is *prima facie* evidence of that fact.[2] But the reasons for the taking of the deposition may be contained in the testimony of the witness, as all the grounds for taking the same might well be presumed to be known to him. He would be likely to know if he lived over one hundred miles from the place of trial, or if not, his residence being fixed the court might take judicial notice of the fact. So he would know whether or not he was bound on a voyage at sea, or about to go out of the United States, or out of the district to a greater distance than one hundred miles from the place of trial, and of his age and the extent of his infirmity. His evidence in relation to these matters ought to be considered of a higher character than the mere certificate of the magistrate, and more than *prima facie* evidence. Such testimony being returned as a part of the deposition, with the proper certificate of the magistrate as to other matters, ought to be satisfactory of the right of the party seeking the deposition to have the same taken, and of the right to have the same read in evidence, provided at the time of trial the witness is dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel or appear at court. But it has been held that if the officer who takes the deposition does not in his certificate assign any reason for taking it, the deposition will be suppressed.[3]

[1] Harris *v.* Wall, 5 How. 693; Rhoads *v.* Selin, 4 Wash. (C. C.) 715; Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; Bell *v.* Morrison, 1 *id.* 356.

[2] Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; Merrill *v.* Dawson, 11 How. 375; Tooker *v.* Thompson, 3 McLean 92.

[3] Shutte *v.* Thompson, 15 Wall. 151; Woodward *v.* Hull, 2 Cr. (C. C.) 235;

What must be Shown on the Trial to Warrant the Reading of a Deposition.

§ 481. The statute expressly provides that no deposition *de bene esse* shall be read in evidence on the trial of a cause unless it is shown—

1. That the witness is dead;

2. Or gone out of the United States;

3. Or to a greater distance than one hundred miles from the place where the court is sitting;

4. Or that, by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel and appear at court.[1]

If at the time the deposition is taken he lives more than one hundred miles from the place of trial, but before the trial occurs he moves to a place less than that distance from the place of trial, his personal attendance would be required, unless other ground exists for reading the deposition, such as residence without the United States, or age, sickness or bodily infirmity unfitting him for travel or attendance upon the court.[2]

Compelling Witnesses to Appear and Testify.

§ 482. The statute provides that witnesses duly summoned to appear before the magistrate may be compelled to appear and testify.

This compulsory power exists in the court of the district in which the examination is taken. The power to compel is by the means and instrumentalities in force in the courts of the state for compelling the attendance and the testimony of witnesses. These include the process of *subpœna duces tecum*, the *subpœna ad testificandum*, the writ of *habeas corpus testificandum*, and the writ of attachment. These writs must issue from a court of the district, on a proper application therefor.[3]

The application for compulsory process should show that the case is one in which a *de bene esse* examination is proper; that

Sage *v.* Tauszky, 6 Cent. L. J. 7; Jones *v.* Knowles, 1 Cr. (C. C.) 523; Dunkle *v.* Worcester, 5 Biss. 102.

[1] Harris *v.* Wall. 7 How. 693; The Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; The Samuel, 1 Wh. 9; Weed *v.* Kellogg, 6 McLean 44; Bowie *v.* Talbot, 1 Cr. (C. C.) 247.

[2] Stein *v.* Bowman, 13 Pet. 209; Bamet *v.* Day, 3 Wash. (C. C.) 243; Pettibone *v.* Derringer, 4 Wash. (C. C.) 243.

[3] *Ex parte* Wm. S. Humphreys, 2 Blatch. 228; United States *v.* Tilden, 25 I. R. R. 352.

the commissioner has jurisdiction of the matter; and other facts authorizing the issuing of process against the witness,[1] and especially, if an attachment is asked, the party asking for it should file affidavits showing that the witness has been guilty of a contempt.[2]

Commissioners May Take Oaths and Acknowledgments in Certain Cases; also Depositions in Admiralty under Rule 49.

§ 483. Section 1878 of the Revised Statutes provides: "In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any state or territory or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any state, district or territory, or any of the commissioners of the circuit court, and when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace."

They may also take further proof on appeal of admiralty cases in the circuit court, by deposition, upon oral examination and cross-examination, or, when ordered by the court and a commission issues, upon written interrogatories and cross-interrogatories. In the former case not ce must be given as provided by the general rule, the time of which may be extended or diminished by the court.[3]

By the act of May 26, 1890, the applicant for the benefit of the homestead, pre-emption, timber culture or desert land law may, if prevented from personal attendance at the district land office, make the affidavit required before any commissioner of the United States circuit court or clerk of a county court and have it transmitted. The proof of settlement, residence, occupation, cultivation, irrigation or reclamation, the affidavit of non-alienation, the oath of allegiance and all other affidavits required to be made under the above laws may be made before a circuit

[1] *Ex parte* Elisha Peck, 3 Blatch. 113.

[2] *Ex parte* Wm. Judson, 3 Blatch. 148. Commissioners have no power to punish for contempt: *Ex parte* Perkins, 29 Fed. Rep. 900.

[3] Admiralty Rule 49.

court commissioner or a judge of a court of record and have the same effect as if made before the register and receiver.[1]

Commissioners May Issue Warrants where Revenue Laws are Violated.

§ 484. The several judges of the circuit and district courts, and commissioners of the circuit courts, may within their respective jurisdictions issue a search warrant authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that fraud upon the revenue has been or is being committed upon or by the use of said premises.[2]

United States commissioners may also issue warrants of arrest for violation of internal revenue laws, upon the sworn complaint of a United States district attorney, collector or deputy collector of internal revenue, or revenue agent or private citizen; but no such warrant of arrest shall be issued upon the sworn complaint of a private citizen unless first approved in writing by a United States district attorney.[3]

Commissioners may issue Warrants for the Arrest of Fugitives for Extradition.

§ 485. In reference to the arrest and extradition of fugitives from justice the statute provides: "Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath charging any person

[1] Act of May 26, 1890, ch. 355, 26 Stat. L. 127, 1 Supp. R. S. 743. Affidavits made before United States court commissioners instead of circuit court commissioners are validated by act of Aug. 4, 1894, ch. 211, 28 Stat. L. 227, 2 Supp. R. S. 224. And by act of March 2, 1895, ch. 174, 28 Stat. L. 744, 2 Supp. R. S. 410, the chief justice of the court exercising federal jurisdiction in the territories may appoint United States court commissioners having the above powers. No commissioner shall be appointed who resides within thirty miles of any local land office, or within thirty miles of any other commissioner. As to an oath to a deputy surveyor, see U. S. *v.* Reilly, 131 U. S. 58.

[2] Rev. Stat. § 3462. For form of affidavit and search warrant in such cases, see *post*, "Forms in proceedings before commissioners."

[3] Act of May 28, 1896, ch. 252, § 19.

found within the limits of any state, district or territory with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If on such hearing he deems the evidence sufficient to sustain the charge, under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."[1] The act of August 3, 1882, provides:

"That all hearings in cases of extradition under treaty, stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public.

"SEC. 2. [Fees. Superseded by the act of 1896.]

"SEC. 3. That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged, setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard, may order that such witnesses be subpœnaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpœnaed in behalf of the United States.

"SEC. 4. That all witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, who is hereby authorized to allow the payment thereof

[1] Rev. Stat. § 5270.

out of the appropriation to defray the expenses of the judiciary; and the Secretary of State shall cause the amount of said fees and costs so allowed to be reimbursed to the government of the United States by the foreign government by whom the proceedings for extradition may have been instituted.

"SEC. 5. That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under Title sixty-six of the Revised Statutes of the United States, such depositions, warrants and other papers or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any deposition, warrant, or other paper or copies thereof, so offered, are authenticated in the manner required by this act."

SEC. 6 repeals so much of section 5271 of the Revised Statutes as is inconsistent with the provisions of the act.[1]

So far as the duty of a commissioner, in connection with the extradition of foreign criminals, is concerned, it is indicated by the two foregoing sections of the Revised Statutes. It has been suggested that the better course would be to first make a demand for the fugitive, after ascertaining his residence within the United States from the executive department of the government, and to secure a mandate from the President, before the judiciary is called upon to act;[2] but such a course of practice is not imperative.[3]

[1] Act of Aug. 3, 1882, ch. 378, 22 Stat. L. 215, 1 Supp. R. S. 371. As to the right of appeal to a district court given by statute to a Chinese person adjudged by a commissioner to be unlawfully in the United States, see U. S. *v.* Wong Dep Ken, 57 Fed. Rep. 203. The commissioner is a "United States judge" within the meaning of the Chinese Exclusion act of May 5, 1892, and has power to make an order of deportation under that statute: *In re* Wong Fock, 81 *id.* 558; *In re* Tsu Tse Mee, *Ibid.* 562, 702.

[2] *In re* Kaine, 3 Blatch. 9.

[3] *In re* McDonnell, 11 Blatch. 79; 6 Opinions of A. G. 91.

There must be a Complaint under Oath.

§ 486. The statute requires in such cases a complaint under oath, charging some person within the limits of the state with having committed some crime in a foreign country, between which and the United States there is a treaty or convention for extradition. The complaint should set forth these facts, and particularly the offence charged or the material features of it, so that the magistrate may determine whether the offence is among those enumerated in the treaty or convention of extradition;[1] and the complaint should recite the treaty and the appointment of the commissioner by some circuit court of the United States.[2]

What the Warrant of Arrest should Contain.

§ 487. The warrant for the arrest of an alleged fugitive from justice should, in extradition cases, show on its face that the commissioner issuing it was duly authorized to do so; and it should also recite the treaty under which the extradition is requested.[3]

What the Magistrate must Certify.

§ 488. Under the provisions of the statute it is also the duty of the commissioner or other acting magistrate to certify the proceedings before him, together with a copy of all the evidence, to the Secretary of State, if he deems the evidence sufficient to sustain the charge under the proper treaty or convention.

Under this provision it would be necessary for the commissioner or other magistrate to take down in writing all the oral testimony offered before him in a narrative form, and to preserve a record of all the objections made to the admissibility of evidence, whether oral or documentary, and his rulings thereon; and it would be advisable to read over the evidence given by each witness to him, and to have him sign the same.[4] Although the original documents in such cases may be in a foreign language, the parties seeking the extradition of the fugitive should furnish an accurate translation of the same by some competent witness, with the affidavit of the translator to the accurate translation thereof, before they can be received in evidence.

[1] *In re* Heinrich, 5 Blatch. 425; *In re* Kaine, 3 *id.* 9.

[2] *In re* McDonnell, 11 Blatch. 79.

[3] *In re* Farey, 7 Blatch. 34; *In re* McDonnell, 11 *id.* 79.

[4] *In re* Heinrich, 5 Blatch. 303.

There is another reason for requiring the commissioner to keep an accurate record of the proceedings, complaint, testimony, documents, etc., and that is, to enable the proper court to review the proceedings and finding on *habeas corpus* or *certiorari* on a proper application therefor.[1] In criminal cases the commissioner is now obliged by statute to keep in a well-bound book a record of all proceedings before him which on his death, resignation, removal, or the expiration of his term, is to be delivered to and preserved by the clerk of the district court. For this the commissioner is to receive no compensation.[2]

Commissioners' Fees; Accounts; Vouchers.

§ 489. By the act of May 28, 1896, it is provided:

"SEC. 21. That each United States commissioner shall be entitled to the following-named fees, and none other: Drawing a complaint, with oath and jurat to same, fifty cents; copy of complaint, with certificate to same, thirty cents; issuing warrant of arrest, seventy-five cents; issuing a commitment and making copy of same, one dollar; entering a return, fifteen cents; issuing subpœna or subpœnas in any one case, with five cents for each necessary witness in addition to the first, twenty-five cents; drawing a bond of defendant and sureties, taking acknowledgment of same and justification of sureties, seventy-five cents; for administering an oath (except to witness as to attendance and travel), ten cents; recognizance of all witnesses in a case, when the defendant or defendants are held for court, fifty cents; transcripts of proceedings, when required by order of court and transmission of original papers to court, sixty cents; copy of warrant of arrest, with certificate to same, when defendant is held for court, and the original papers are not sent to court, forty cents; order in duplicate to pay all witnesses in a case: for first witness, thirty cents, and for each additional witness, five cents, and for oath to each witness as to attendance and travel, five cents; for

[1] *In re* McDonnell, 11 Blatch. 79. See also for suggestions as to proper practice and expositions of the statutes on this subject: The British Prisoners, 1 Wood & M. 66; *In re* Joseph Stupp, 11 Blatch. 124; *In re* Thomas, 12 *id.* 370; *In re* Giacomo, *Ibid.* 390; United States *v.* Lawrence, 13 *id.* 295; *In re* Kaine, 14 How. 103; Case of Jose Ferreirados Santos, 2 Brock. 493; United States *v.* Davis, 2 Sum. 92; *In re* Francois Farez, 7 Blatch. 345.

[2] Act of May 28, 1896, *infra*.

hearing and deciding on criminal charges,[1] and reducing the testimony to writing when required by law or order of court, five dollars a day for the time necessarily employed: *Provided*, That not more than one per diem shall be allowed in a case, unless the account shall show that the hearing could not be completed in one day, when one additional per diem may be specially approved and allowed by the court: *Provided further*, That not more than one per diem shall be allowed for one day: *Provided further*, That no per diem shall be allowed for taking a bond or recognizance and passing on the sufficiency of the bond or recognizance and the sureties thereon when the bond or recognizance was taken after the defendant had been committed to prison upon a final commitment, or has given bond or been recognized for his appearance at court, or when the defendant has been arrested on a capias or bench warrant, or was in custody under any process or order of a court of record. For the examination and certificate in cases of application for discharge of poor convicts imprisoned for non-payment of fine or fine and costs, and all services connected therewith, three dollars; for attending to a reference in a litigated matter, in a civil cause at law, in equity or in admiralty, in pursuance of an order of the court, three dollars a day; for taking and certifying depositions to file in civil cases, ten cents for each folio;[2] for each copy of the same furnished to a party on request, ten cents for each folio; for issuing any warrant under the tenth article of the treaty of August ninth, eighteen hundred and forty-two, between the United States and the Queen of the United Kingdom of Great Britain and Ireland,

[1] The decision of a commissioner upon a motion for bail and the sufficiency thereof and his decision upon a motion for a continuance of the hearing of a criminal charge are judicial acts in the "hearing and deciding on criminal charges:" U. S. *v.* Jones, 134 U. S. 483.

[2] Folio, in this connection, means one hundred words, counting each figure as a word. Where there are over fifty and less than one hundred words, they must be counted as one folio; but a less number than fifty words cannot be counted except when the whole statute, notice or order contains less than fifty words: Rev. Stat. § 854. The jurat attached to a deposition is not a certificate to the deposition in the ordinary sense of the term, but a certificate of the fact that the witness appeared before the commissioner and was sworn to the truth of what he had stated; and the commissioner is entitled to a separate fee therefor: U. S. *v.* Julian, 162 U. S. 324.

against any parties charged with any crime or offence set forth in said article, two dollars; for issuing any warrant under the provision of the convention for the surrender of criminals between the United States and the King of the French, concluded at Washington, November ninth, eighteen hundred and forty-three, two dollars; for hearing and deciding upon the case of any person charged with any crime or offence, and arrested under the provisions of said treaty or of said convention, five dollars a day for the time necessarily employed.

"Such commissioners shall keep a complete record of all proceedings before them in criminal cases, in a well-bound book, which record book shall be delivered to and preserved by the clerk of the district court for such district on the death, resignation, removal or expiration of term of the commissioner, for which record the commissioner shall receive no compensation."[1]

How to Obtain an Allowance and Payment of Commissioners' Fees.

§ 490. United States commissioners must forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they should be submitted for approval in open court, and in the presence of the district attorney or his sworn assistant, whose presence is required to be noted on the record, and prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, that the services therein charged have been actually and necessarily performed as therein stated, and the court must thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law and just. But the accounts thus approved or disapproved

[1] Act of May 28, 1896, ch. 252, Stat. L. 1895–96, 184, etc. It may be convenient here to refer to a number of the cases decided on the former statute regulating the fees of commissioners: Rev. Stat. § 847. See, on this subject, U. S. *v.* Patterson, 150 U. S. 65; U. S. *v.* Hall, 147 *id.* 691; U. S. *v.* Ewing, 140 *id.* 142; U. S. *v.* Alfred, 155 *id.* 591; Southworth *v.* U. S., 151 *id.* 179; U. S. *v.* Clough, 6 U. S. App. 377; U. S. *v.* Rand, 5 *id.* 230; U. S. *v.* Dundy, 76 Fed. Rep. 355; Churchill *v.* U. S., 67 *id.* 529; Hallett *v.* U. S., 63 *id.* 817; Hirschbeck *v.* U. S., *Ibid.* 949; Fuller *v.* U. S., 58 *id.* 329.

are still subject to revision by the accounting officers of the treasury.[1]

The Accounts of Commissioners and other Ministerial Officers Subject to Revision by the Accounting Officers of the Treasury Department.

§ 491. Section 846 of the Revised Statutes provides: "The accounts of district attorneys, clerks, marshals and commissioners of the circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts."

It will be manifest from the foregoing provisions that the certificate of the judge is merely *prima facie* evidence of the correctness of the account, and the accounting officers of the Treasury Department may reject the whole or any item or items of the account.[2] By a later statute it is provided that the accounts of court officers (except of consular courts) shall, before transmission to the Department of the Treasury, be sent with their vouchers to the Attorney-General and examined under his supervision.[3] The agents of the latter have the right to examine the records and dockets of these officers at any time.[4]

The Practice and Procedure on Preliminary Examinations before Commissioners Applicable Generally.

§ 492. The statute provides not only for the arrest and preliminary examination of offenders against the United States by

[1] Act of Feb. 22, 1875, ch. 95, § 1.

[2] United States *v.* Smith, 1 W. & M. 184; United States *v.* Ingersoll, Crabbe 135. For form of account, see *post*, "Forms in proceedings before commissioners."

[3] Act of July 31, 1894, ch. 174, § 13, 28 Stat. L. 162, etc., 2 Supp. R. S. 218.

[4] Act of March 3, 1891, ch. 542, par. 7, 26 Stat. L. 948, 1 Supp. R. S. 928. No part of any money appropriated to pay fees to United States commissioners, marshals or clerks shall be used for any warrant issued or arrest made or other fees in prosecutions under the internal revenue laws, unless said fees have been taxed against and collected from the defendant or unless the prosecution has been commenced upon the affidavit of a witness or a sworn complaint of a United States officer, duly approved: Act of Aug. 18, 1894, ch. 301, par. 21, 28 Stat. L. 372, etc., 2 Supp. R. S. 258; Act of March 3, 1893, ch. 208, par. 19, 27 Stat. L. 572, etc., 2 Supp. R. S. 123.

a commissioner of a circuit court, but "by any chancellor, judge of the supreme or inferior court, chief or first judge of common pleas, mayor of a city, justice of the peace or other magistrate of any state where he may be found, and agreeable to the usual mode of process against offenders in such state." The general mode of procedure which we have indicated in this chapter, for commissioners, would be equally applicable to other magistrates in similar cases.

Statutes Local in Their Operation.

§ 493. A few statutes, local in their operation, relating to commissioners, may be here briefly summarized.

By the act of June 23, 1874, the Supreme Court of Utah Territory may appoint commissioners of said court to exercise the powers of circuit court commissioners, and take acknowledgments of bail and with the same authority as examining and committing magistrates under the laws of that Territory as is possessed by justices of the peace.[1]

By the act of May 17, 1884, the President is to appoint four commissioners for Alaska, who shall have the jurisdiction and powers of circuit court commissioners in any part of the district, as well as some other powers.[2]

By the act of May 2, 1890, the United States Court in Indian Territory may appoint commissioners to be known as United States commissioners, who shall have all the powers of circuit court commissioners, shall be notaries public, may solemnize marriages, etc.[3] By a later statute additional judges of the court may also make such appointments.[4]

By the act of May 7, 1894, the circuit court in the district of Wyoming shall appoint a commissioner to reside in Yellowstone Park, who shall have jurisdiction to hear and act upon all complaints of violations of the law or of the rules and regulations

[1] Act of June 23, 1874, ch. 469, § 6, 18 Stat. L. 253, 1 Supp. R. S. 51.

[2] Act of May 17, 1884, ch. 53, § 5, 23 Stat. L. 24, 1 Supp. R. S. 431. Mandamus lies to compel the commissioner in Alaska to bring parties before him: Finn *v.* Hoyt, 52 Fed. Rep. 83.

[3] Act of May 2, 1890, ch. 182, § 39, 26 Stat. L. 81, etc., 1 Supp. R. S. 737.

[4] Act of March 1, 1895, ch. 145, § 4, 28 Stat. L. 693, 2 Supp. R. S. 394. The commissioners are to hear complaints of violations of the liquor law: Act of July 23, 1892, ch. 234, 27 Stat. L. 260, 2 Supp. R. S. 45.

of the Park, etc., with power to arrest, grant bail, try and impose punishment therein. Appeal lies from his judgment to the United States district court for Wyoming, but the circuit court may prescribe rules of procedure and practice for the commissioner in the trial of cases and for appeal to the district court. He has power to arrest for felony, to hear the evidence and certify the transcript of the record and testimony to the district court which shall have jurisdiction. All process issued by him shall be directed to the United States marshal for the district of Wyoming.[1]

[1] Act of May 7, 1894, ch. 72, § 5, 28 Stat. L. 73, etc., 2 Supp. R. S. 185.

CHAPTER XIX.

WRITS OF PROHIBITION.

Authority of the Court to Issue.

§ 494. The power of the Supreme Court to issue writs of prohibition and writs of mandamus is expressly conferred by a provision of the Revised Statutes, which is as follows: "The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of the law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a state, or ambassador or other public minister, or consul or vice-consul, is a party."[1] The writ of prohibition is an ancient common law writ, and commands the person or tribunal to whom it is directed not to do some act which the court is advised, at the suggestion of the relator, is about to be done contrary to law.[2] The English practice and precedents are generally followed in this country on applications for this writ. The ground therefor is that the district court, proceeding as a court of admiralty and maritime jurisdiction, has no cognizance of the cause, and that the proper jurisdiction thereof belongs to some

[1] Rev. Stat. § 688.

[2] If the act is already done the writ cannot undo it. The only effect of the writ is to suspend and prevent further action: United States *v.* Hoffman, 4 Wall. 158. For history of writ see Lincoln-Lucky & Lee Min. Co. *v.* District Court (New Mex.), 38 Pac. Rep. 580. A territorial Supreme Court may issue the writ to a district court of the territory: *Ibid.* By act of March 1, 1895, ch. 145, § 2, 2 Supp. R. S. 393, the judges of the United States Court in Indian Territory are given power to issue writs of prohibition. As to the power of the circuit court of appeals to issue the writ, see U. S. *v.* Williams, 32 U. S. App. 126.

other court.[1] The general English practice prescribed by statute provided for an application for the writ by motion supported by affidavits; but if the question was complicated, doubtful and uncertain, the party applying therefor was required to make a declaration in prohibition, and to set forth a concise statement of the proceedings in respect to which he prayed for the writ to issue.[2] The practice in this court is to file a motion supported by a petition duly verified, setting forth facts upon which the petitioner relies for the issuance of the writ.[3] The jurisdiction of this court in such cases is in effect appellate, as it is required to review the proposed action of the district court and determine whether such action is legal, and if not, to prohibit the same. The statute limits the issuance of the writ "to the district courts when proceeding as courts of admiralty and maritime jurisdiction."[4]

Under this provision, application was made, in 1795, for a writ of prohibition to the "judge of the district court of the United States in and for the district of Pennsylvania, to be directed to prohibit him from holding" further jurisdiction of a case pending before him.

The proceedings in the suit, sought to be prohibited, were by libel and process of arrest against the commander of an armed vessel of the French Republic, for an alleged illegal capture on the high seas of a neutral merchant vessel, the property of a citizen of the state of Pennsylvania, and carried into Port de Paix, within the French Republic, the commander of the armed vessel being then in the port of Philadelphia. The suggestion was filed by the commander, in the Supreme Court, in which it was claimed that by the laws of nations and by treaties subsisting between the United States and the French Republic, trials of captures on the high seas of vessels brought within the dominion

[1] The ground for issuing the writ is that the court has no jurisdiction of the parties or the subject matter: *In re* Fassett, 142 U. S. 479, 486; followed in *In re* Engles, 146 *id.* 357; *In re* Morrison, 147 *id.* 14.

[2] 1 Wm. IV., ch. 21; 2 Bl. Com. 113. For general practice in England, see Cases in Prohibition, 14 Petersdorf Ab., word *Prohibition;* Pleadings and Forms, 6 Wentworth's Pl. 242; Crouch *v.* Collins, 1 Saund. 136; 2 Chit. Gen. Pr. 355; 2 Sell's Pr. 425.

[3] *Ex parte* Gordon, 1 Black. 503; *Ex parte* Easton, 95 U. S. 68.

[4] Sec. 13 of the Judiciary Act of 1789; Rev. Stat. § 688.

and jurisdiction of the Republic, and all questions incidental thereto, belonged exclusively to the judiciary of the Republic, and to no other tribunals; that by the law of nations and the aforesaid treaties, the vessels of war of the Republic and the officers commanding them cannot be sued or arrested in ports of the United States for captures on the high seas, and taken for legal adjudication into the ports of the Republic; and that the district court of the United States ought not to maintain jurisdiction or hold pleas of such captures.

The motion for the prohibition was opposed on the ground that the district court had jurisdiction; that if this point were doubtful the prohibition ought not to issue until after sentence; and that on a plea to jurisdiction the injured party had an adequate remedy by appeal. But the court sustained the motion.[1]

This case settled the construction of the statute as to the functions of the writ, and established substantially the common law practice as to its appropriate use in restraining the illegal cognizance of proceedings where there is a want of jurisdiction, even when there is another adequate remedy.[2]

The Writ will Issue only in the Cases Expressly Provided for by Statute.

§ 495. Under the 14th section of the Judiciary Act (now section 716 of the Revised Statutes), it was provided that the Supreme, circuit and district courts shall "have power to issue writs not specifically provided for by statute, which may be

[1] United States *v.* Peters, 3 Dall. 121.

[2] In the case of The Exchange *v.* McFadden, 7 Cr. 116, it was held that a public vessel of war belonging to a foreign sovereign at peace with the United States, when visiting our ports in a friendly manner, is exempt from the jurisdiction of our courts; that unless there is some prohibition, the ports of a friendly nation are considered as open to the public ships of all nations with whom it is at peace; and that they are entitled to the protection of the country whose ports they must enter. And in the case of The Alecta, 9 Cr. 264, it was laid down as a general rule as to prize jurisdiction, that the trial of captures made on the high seas, *jure belli*, by a duly commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to that nation to which the captor belongs.

A party is entitled to a writ of prohibition as a matter of right where it clearly appears that the court had no jurisdiction, and there is no other

necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."[1]

In 1845 a motion was made to the Supreme Court for a writ of prohibition, to be issued to the district court of the United States for the district of Louisiana, sitting in bankruptcy. It was claimed in support of the motion that it was a proper case for the issuance of the writ; for although there was no special provision made by statute therefor in cases at law or in equity, it was necessary for the appropriate exercise of the appellate powers of the Supreme Court under the provision last referred to. But Judge Story, in an elaborate opinion, disposed of the case by holding that the district court had jurisdiction, and thereby made it unnecessary to decide the question of the power of this court to issue the writ. On this question he observed: "As the district court has not exceeded its jurisdistion, it is not absolutely necessary to be decided. But it may be proper to say, as the point has been fully argued, that we possess no revising power over the decrees of the district court sitting in bankruptcy; that we know of no case where this court is authorized to issue a writ of prohibition to the district court except in the cases expressly provided for, . . . that is to say, where the district courts are proceeding as courts of admiralty and maritime jurisdiction."[2]

The same doctrine was recognized in a subsequent case where application was made for a writ of prohibition to the judges of the circuit court of the United States for the southern district of New York, and its officers and the marshal, to restrain them from further proceeding in a case where the applicant had been found guilty of piracy and sentenced to death. But the court refused the motion for the writ, holding that it could not issue

remedy. Where there is another remedy, or where the jurisdiction is in doubt, the granting of the writ is in the discretion of the court: *In re* Rice, 155 U. S. 396; *In re* New York & P. R. Stp. Co., *Ibid.* 523; and see *In re* Alix, 166 *id.* 136. See *In re* Cooper, 143 *id.* 472, where the entire subject is reviewed in a very clear and cogent opinion by the chief justice. This case also discusses the jurisdiction of the district court of Alaska and the jurisdiction of courts over political questions.

[1] By § 12 of the act of March 3, 1891, the circuit court of appeals is given the powers specified in this section. See U. S. *v.* Williams, 32 U. S. App. 126.

[2] *In re* Christy, 3 How. 292.

in cases where there is no appellate power or authority of law so to do; and that it would not lie to a circuit court in a criminal case.[1]

In *Ex parte* Graham [2] the application was for a writ to restrain a district judge from proceeding under the act entitled "An act to suppress insurrection and punish treason and rebellion; to seize and confiscate the property of rebels," etc. The act provided that the proceedings should be *in rem*, "and conform as near as may be to the proceedings in admiralty or revenue cases." But the court held that, as it had power to issue the writ only in cases of admiralty and maritime jurisdiction, and the proceedings sought to be prohibited were not of these cases, it could not issue the writ.[3] It was further suggested by the court that if there should be error in the proceedings of the district court, there would be a remedy for the petitioners by a writ of error from the circuit to the district court, and finally from that court to the Supreme Court.

Power is vested in the Supreme Court to issue writs of prohibition to the district courts only where said courts are assuming to take cognizance of cases of admiralty and maritime jurisdiction when they have no jurisdiction;[4] and they can exercise this power in no other case. If the act is done the writ cannot undo it. The only effect of the writ is to suspend action.[5]

Where it will not Issue.

§ 496. The writ of prohibition will not issue to stop the action of the district court or revise its decrees in bankruptcy, nor in any case to that court except the one mentioned in section 688 of the Revised Statutes; as the particular provision there made for its issuance to the district court in certain cases excludes all authority to issue it under the general provisions of section 716 of the Revised Statutes.[6] And whether the district court has trans-

[1] *Ex parte* Gordon, 1 Black 503 (1861). See also *Ex parte* Warmouth, 17 Wall. 64.

[2] 10 Wall. 541.

[3] The Union Insurance Co. *v.* United States, 6 Wall. 759; United States *v.* Armstrong's Foundry, *Ibid.* 766; The Sarah, 8 Wh. 391.

[4] *Ex parte* Easton, 95 U. S. 68; United States *v.* Peters, 3 Dall. 121.

[5] United States *v.* Hoffman, 4 Wall. 158; *In re* Christy, 3 How 292.

[6] *Ex parte* Gordon, 1 Black 503; *In re* Christy, 3 How. 292; *Ex parte* Warmouth, 17 Wall. 64,

cended its jurisdiction depends upon the facts stated in the record upon which the district court is called upon to act, and upon which only it can act, and this court will not, upon an application for the writ, look into matters *dehors* the record.[1]

Application for the Writ.

§ 497. We have briefly considered the office and functions of the writ of prohibition. The formal application for the writ is called a suggestion, and it should be entitled in the court from which it proceeds, but not in any case or matter, as there is no cause in court.[2] The suggestion, as we have before observed, may be in the form of a petition or motion, supported by affidavits.[3]

[1] *Ex parte* Easton, 95 U. S. 68.

[2] Lloyd on Proh. 56.

[3] A further discussion of the jurisdiction to issue this writ, its offices and purpose, and the practice touching its issuance will be found in High on Extraordinary Remedies (2d ed.), § 786 *et seq.* See U. S. *v.* Williams, 67 Fed. Rep. 384; s. c., 32 U. S. App. 126.

CHAPTER XX.

WRITS OF MANDAMUS.

A Common Law Prerogative Writ.

§ 498. The writ of mandamus is an ancient common law prerogative writ, which issued from the Court of King's Bench and was directed to some person, corporation or inferior court, commanding some particular act or acts to be done which it was their clear duty to do or which had been adjudged should be done or performed by them. It was instituted to prevent a failure of justice, as where the law enjoined a duty upon a judge or court or corporation which they refused to perform, and in the performance of which the party claiming the writ was interested, and by the non-performance of which he would be injured, and the law afforded no other specific or adequate remedy. These general doctrines and principles are applicable to the practice in the federal courts. If the act required is impossible of performance or the right to insist upon its performance is doubtful, or if there is a speedy, adequate and complete remedy by other proceedings at law, the writ will be refused.[1]

Provisions of the Revised Statutes Relating to Writs of Mandamus.

§ 499. The Revised Statutes provide that the Supreme Court shall have power to issue "writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a state, or an ambassador or other public minister, or a consul or vice-

[1] Add. on Torts (Wood's ed.), § 1505; Reg. *v.* Chichester, etc., 29 L. J., Q. B. 23; *Ex parte* Briggs, 28 *id.* 272; Commonwealth *v.* Denison, 24 How. 66.

consul, is a party."[1] This provision limits the authority of the Supreme Court to certain cases. But another section of the statutes provides as follows: "The Supreme Court and the circuit and district courts, shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."[2]

The latter provision confers upon this court, and upon the circuit and district courts, authority to issue this writ, when it becomes necessary for the proper exercise of their jurisdiction.[3]

In the former case the writ will issue from the Supreme Court in cases warranted by the principles and usages of the common law, only against federal courts or officers, where a state, or ambassador or other public minister, or a consul or vice-consul, is a party. Under the general principles of the common law the writ will not issue where there is any other appropriate remedy.[4] Thus, it will not be issued if the party aggrieved may have a remedy by writ of error or appeal,[5] as to compel an inferior court to reverse its judgment,[6] or to re-examine a judgment or decree,[7] or to compel the issuance of a mandamus which has been refused,[8] or to compel the reversal of any order, although it may

[1] Rev. Stat. § 688. The act of March 1, 1895, ch. 145, § 2, 2 Supp. R. S. 393, gives the judges of the U. S. Court in Indian Territory power to issue writs of mandamus.

[2] Rev. Stat. § 716. By § 12 of the act of March 3, 1891, these powers are given to the circuit court of appeals, but are incidental to its other powers, and not to be exercised except when incidental: *In re* Iron County, 37 U. S. App. 622.

[3] The circuit and district courts have no power to issue a writ of mandamus as an original and independent proceeding, but only where the writ is auxiliary: Gares *v.* Nth. West Nat. Bldg., L. & I. Assn., 55 Fed. Rep. 209; State *v.* Columbus & X. R. Co., 48 *id.* 626; *In re* Forsyth, 78 *id.* 296; following Rosenbaum *v.* Bauer, 120 U. S. 450; *In re* Vintschger, 50 Fed. Rep. 459.

[4] Crawford *v.* Addison, 22 How. 174. *In re* Morrison, 147 U. S. 14, 26; *In re* Atlantic City R. Co., 164 *id.* 633; Amer. Constr. Co. *v.* Jacksonville, &c., R. Co., 148 *id.* 372.

[5] *Ex parte* Newman, 14 Wall. 152; *Ex parte* Schwaub, 98 U. S. 240; *Ex parte* Loring, 94 *id.* 418; *Ex parte* Flippin, *Ibid.* 348.

[6] *Ex parte* Taylor, 14 How. 3; *Ex parte* William Many, *Ibid.* 24.

[7] *Ex parte* Newman, 14 Wall. 152; *Ex parte* Schwaub, 98 U. S. 240; *Ex parte* Railroad Co., 103 *id.* 794.

[8] *Ex parte* De Groot, 7 Wall. 497.

seem to bear harshly and oppressively upon a party,[1] or to compel a court to quash a writ of execution,[2] or to vacate any order,[3] or to compel a judge to proceed according to the rules of chancery practice in a suit in equity even if he is proceeding in the case irregularly,[4] or to compel the allowance of an amendment,[5] or to compel the court to decide a matter in a particular way.[6] Nor will the court, on general principles, issue a writ to control the inferior court or officer in the exercise of a discretion where the discretion is exercised, as in a case of a motion for a new trial,[7] or in case of the rejection of a bond offered for approval.[8]

Functions of the Writ.

§ 500. It is the function and office of the writ to compel the performance of duties that are unquestionably right and proper to be performed;[9] and not to control the judgment of the inferior court or officer in a matter of discretion, or where judgment has been exercised in a matter within the jurisdiction of the court or the proper scope of the powers or functions of the officer.[10]

Where there is a Discretion.

§ 501. Where there is an official judgment or discretion to be exercised, a writ of mandamus may issue to compel action in

[1] *Ex parte* Myra Clarke Whitney, 13 Pet. 404.

[2] *Ex parte* Flippin, 94 U. S. 348.

[3] *Ex parte* Loring, 94 U. S. 418.

[4] *Ex parte* Myra Clarke Whitney, 13 Pet. 404.

[5] *Ex parte* Wm. Many, 14 How. 24.

[6] *In re* Parsons, 150 U. S. 150; *In re* Rice, 155 *id.* 396.

[7] Life and Fire Ins. Co. *v.* Wilson, 8 Pet. 291.

[8] *Ex parte* Milwaukee R. Co., 5 Wall. 188. See *In re* Haberman Mfg. Co., 147 U. S. 525. Where the circuit court of appeals refused to receive further proofs in an admiralty case on appeal, it was held that the Supreme Court could not review its action by mandamus: *In re* Hawkins, 147 *id.* 486. A railway company will not be compelled by mandamus to do a particular act in the running of trains or construction of the road, unless there is a clear legal duty to do the act and proof of a breach of that duty: Northern Pac. R. Co. *v.* Tustin, 142 U. S. 492.

[9] A pensioner should appeal from the rulings of the commissioner to the Secretary of the Interior before applying for a mandamus against the commissioner: Lochren *v.* Long, 6 App. D. C. 486.

[10] *Ex parte* Cutting, 94 U. S. 14; *Ex parte* David Taylor, 14 How. 3; *Ex parte* Wm. Many, *Ibid.* 24; *Ex parte* Joseph Bradley, 7 Wall. 364; *Ex parte* Butting, 94 U. S. 14; Arlington *v.* Van Huton, 44 Ala. 284; Reading *v.* Cummings, 11 Pa. St. 196; People *v.* Thompson, 25 Barb. 75; Fitch *v.* McDiarmid, 26 Ark. 482; Stub *v.* McCrillus, 4 Kans. 250; *Ex parte* Conway, 6 Tex. 457; People *v.* Board of Police, 26 N. Y. 316; School

these respects, but it will not be allowed either to commend a particular judgment or to interfere with the exercise of the discretion.[1]

The refusal to exercise a discretion may constitute a proper case for the issuance of the writ, but where the mode of action is also in the discretion of the party against whom it is sought, it will not issue so as to interfere with such discretion.[2]

Instances where it has been Issued.

§ 502. It has been held proper to issue the writ from a circuit court, on the ground of necessity for the exercise of its jurisdiction, to compel a municipal corporation to levy a tax to pay a judgment rendered by such court against the corporation;[3] to

Ins. *v.* People, 20 Ill. 530; New Orleans *v.* Paine, 147 U. S. 261.

[1] United States *v.* Lawrence, 3 Dill. 42; Railroad Co. *v.* Wiswall, 23 Wall. 507; *Ex parte* Bradstreet, 4 Pet. 102; s. c., 7 *id.* 634; s. c., 8 *id.* 588; Insurance Co. *v.* Comstock, 16 Wall. 270; Livingstone *v.* Dorgenois, 7 Cr. 577; *Ex parte* Crane, 5 Pet. 190; Appling *v.* Bailey, 44 Ala. 333; Matter of Nabor, 7 *id.* 459; Dixon *v.* Field, 10 Ark. 243; Manor *v.* McCall, 5 Ga. 522; Warden *v.* Town Council, 9 R. I. 128; Mayor *v.* Rainwater, 47 Miss. 547; People *v.* Judge, etc., 24 Mich. 408; *Ex parte* Newman, 14 Wall. 152; United States *v.* Seaman, 17 How. 225; United States *v.* Commissioners, 5 Wall. 553; Secretary *v.* McGarrahan, 9 *id.* 298. The executive department cannot be controlled by mandamus; but the courts may compel an officer to perform an official duty. If the duty is discretionary he can only be compelled to exercise his discretion; if the duty is to perform a particular act not discretionary he can be compelled by mandamus to do the particular act in question: U. S. *ex rel.* Redfield *v.* Windom, 19 D. C. 54. See also International Cont. Co. *v.* Lamont, 155 U. S 303. A court may be compelled by mandamus to take jurisdiction: *In re* Hohorst, 150 U. S. 653; but where a circuit or district court refuses to take jurisdiction and the case may be certified to the Supreme Court, the Supreme Court alone and not the circuit court of appeals may grant the writ: *In re* Mudrill Min. Co., 31 U. S. App. 112; *In re* Iron County, 37 *id.* 622.

[2] *Ibid.*; McDiarmid *v.* Fitch, 27 Ark. 106; McMullin *v.* State, 26 *id.* 613; State *v.* Warmouth, 23 La. Ann. 76; East Boston Ferry Co. *v.* Boston, 101 Mass. 488; Commissioners *v.* Philadelphia, 3 Brewst. (Pa.) 596; *Ex parte* Smith, 44 Ala. 654; Appling *v.* Bailey, *Ibid.* 333; 2 Add. on Torts (Wood's ed.), 719 *et seq.*; Life and Fire Ins. Co. *v.* Adams, 9 Pet. 573; *Ex parte* Poultney, 12 *id.* 472; *Ex parte* Taylor, 14 How. 3.

[3] United States *v.* Keokuk, 6 Wall. 516; Riggs *v.* Johnston Co., *Ibid.* 166; Wakeley *v.* Muscatine, *Ibid.* 481. See also Lower *v.* U. S., 91 U. S. 536; United States *v.* New Orleans, 98 *id.* 381.

restore an officer to an office from which he has been unlawfully removed;[1] to compel an incumbent of an office to deliver up papers, property and the insignia of the office to his successor;[2] to compel a city council to pay certain necessary expenses authorized by the legislature;[3] to compel trustees to admit children to schools, where they are entitled to the right of attendance;[4] to compel a board of canvassers to make a complete canvass of all the returns received by them;[5] to compel a judge of an inferior court to sign a bill of exceptions in a case tried before him,[6] or to make up a record and give judgment thereon, so that a writ of error may be brought;[7] to compel a judge to enter a judgment rendered by his predecessors;[8] to compel a judge to enter a judgment on the report of a referee;[9] to compel a clerk to issue an execution on a judgment;[10] and generally to compel the performance of all ministerial duties on the part of officers, corporations and inferior courts, where there is no other adequate legal remedy by which the specific duty can be enforced, and the relator has a clear legal right to the performance of it, and the performance is refused.[11] Under the power conferred by the statute, the Supreme Court may issue this writ to the Court of Claims to compel it to hear and determine a motion for a new trial;[12] and to a district court commanding it to execute its decrees, notwithstanding the legislature of the state has attempted

[1] Drew *v.* Judges, 3 H. & M. (Va.) 1; People *v.* Board of Police, 35 Barb. 531; State *v.* Common Council, 9 Wis. 254. But the writ will not issue to try the title to a public office: Cameron *v.* Parker, 2 Okla. 277.

[2] Walter *v.* Belding, 24 Vt. 658; Church *v.* Slack, 7 Cush. 226; Sudbury *v.* Stearns, 21 Pick. 148.

[3] Commissioners *v.* Philadelphia, 3 Brewst. (Pa.) 596.

[4] State *v.* Duffy, 7 Nev. 342.

[5] Florida *v.* Gibbs, 13 Fla. 55.

[6] Porter *v.* Harris, 4 Coll. (Va.) 485; State *v.* Hull, 3 Cold. (Tenn.) 255; People *v.* Pearsons, 3 Ill. 189; *Ex parte* Crane, 5 Pet. 190.

[7] *Ex parte* Bradstreet, 7 Pet. 634.

[8] Life Insurance Co. *v.* Wilson, 8 Pet. 291.

[9] Russell *v.* Elliott, 2 Cal. 245.

[10] People *v.* Loucks, 28 Cal. 68.

[11] Nelson *v.* Justices, 1 Cold. (Tenn.) 207; People *v.* Green, 64 N. Y. 499; People *v.* Supervisors, *Ibid.* 600; Strong, Petitioner, 20 Pick. 484; Traver *v.* Commissioners, 17 Ala. 527; State Nicholson Pavement Co. *v.* Mayor, 35 N. J. 396; People *v.* Easton, 13 Abb. Pr. (N. S.) 159; People *v.* Supervisors, 12 Barb. 217; Railroad Co. *v.* Clinton Co., 1 Ohio St. 77; People *v.* Thompson, 64 N. Y. 600; People *v.* Thompson, 25 Barb. 73; People *v.* Head, 25 Ill. 325; People *v.* Hilliard, 29 *id.* 418; High's Ex. Leg. Rem. Tit. Mand.

[12] *Ex parte* United States, 16 Wall. 699.

to annul them on the ground that the court had no jurisdiction.[1] Where the mandate of the Supreme Court leaves nothing to the discretion of the court below, it may be enforced by mandamus.[2] Matters left open by the mandate may be considered, and the decision thereon can be reviewed only by a new appeal. On application for mandamus or upon new appeal the Supreme Court will construe its own mandate.[3] The circuits courts of appeal may enforce their mandates by mandamus.[4]

When a Mandamus is Necessary for the Exercise of Jurisdiction.

§ 503. Under section 716 of the Revised Statutes, the writ can only issue from the Supreme Court and the circuit and district courts in cases where it "may be necessary for the exercise of their respective jurisdictions agreeable to the usages and principles of the law." Under this provision the circuit court cannot grant it unless it is necessary for the exercise of its jurisdiction, although the parties are citizens of different states.[5] But the circuit court has a right, as we have noticed, to issue the writ against a municipal corporation to compel the levy of a tax to pay a judgment rendered against the corporation in said court,[6] as this is necessary for the proper exercise of its jurisdiction. But a mandamus from the Supreme Court to a district court is

[1] United States *v.* Peters, 5 Cr. 115. Where at defendant's suggestion a U. S. Circuit Court has assumed jurisdiction without proper proceedings for removal of a criminal prosecution begun in a state court, a mandamus will lie on behalf of the state to compel the remanding of the cause: Virginia *v.* Paul, 148 U. S. 107.

[2] City Bank of Fort Worth *v.* Hunter, 152 U. S. 512; s. c., 153 *id.* 246; Mason *v.* Pewabic Min. Co, *Ibid.* 361; Hudson *v.* Parker, 156 *id.* 277; Gaines *v.* Rugg, 148 *id.* 228. In this case the court said at p. 243: "Although it might have been admissible to raise the question by a new appeal to the proper court, yet in view of the delay to be caused thereby, we do not consider that such remedy would have been or would be fully adequate, or that a writ of mandamus is now improper."

[3] *In re* Sanford Fork & Tool Co., 160 U. S. 247.

[4] *In re* Nth. Ala. Devel. Co., 30 U. S. App. 646.

[5] Wheeling *v.* Mayor, 1 Hughes 90; Bath Court *v.* Amy, 13 Wall. 244; Graham *v.* Norton, 1 Wall. 427.

[6] Riggs *v.* Johnston Co., 6 Wall. 166; United States *v.* Johnson, 7 Cent. L. J. 130; United States *v.* New Orleans, 98 U. S. 381; Supervisors *v.* United States, 4 Wall. 435; Commissioners *v.* Aspinwall, 24 Howard 376; Weber *v.* Lee County, 6 Wall. 210. Cf. Stewart *v.* St. Clair County, 62 Justices, 47 Fed. Rep. 482; *In re* Copenhaver, 54 *id.* 660.

not necessary for the exercise of the appellate jurisdiction of the court, except in those cases where the appeal is direct to the Supreme Court, as the proper appellate court would be the circuit court of appeals.[1]

Practice and Proceedings.

§ 504. The writ is either alternative or peremptory; and the first writ issued is usually an alternative one, requiring the party against whom it is issued to do the act or show cause why he does not, at some specified time and place. If the defendant appears and shows sufficient excuse, then the writ is dismissed; but if otherwise, or he makes default, then the peremptory writ issues commanding the act to be done.

But this does not appear to be the uniform practice in the Supreme or other federal courts. The relator sometimes proceeds by motion based upon an affidavit, for an order to show cause why the writ should not issue. The hearing on the motion is sometimes, if not generally, *ex parte*, and without notice to the party against whom it is sought. The order, if allowed, is served on the defendant, and requires him to appear and show cause against the issuing of the writ at a certain time and place, when he can have an opportunity to be heard and to controvert the statements in the relator's affidavit by counter affidavits.

Another mode of proceeding is by petition or complaint under oath, in which the relator sets forth the facts which entitle him to the writ, to which the attention of the court is called by motion, after due notice to the defendant of the time and place it will be heard, at which time he has an opportunity to defend, and may demur, move to quash, answer, or reply to the petition or complaint, as he may deem advisable.

When the Writ will not Issue.

§ 505. The writ of mandamus is not a proper process for the correction of erroneous judgments or decrees of the inferior court;[2] nor will it issue to compel such court to open up a judg-

[1] *Ex parte* Jesse Hoyt, 13 Pet. 279.

[2] *Ex parte* Hoyt, 13 Pet. 279; *Ex parte* Whitney, *Ibid.* 404; *Ex parte* Flippin, 94 U. S. 348; *Ex parte* Loring, *Ibid.* 418; *Ex parte* Railroad, 101 *id.* 711; Railroad Co. *v.* Alling, 99 *id.* 463; *Ex parte* French, 100 *id.* 5; *In re* Humes, 149 *id.* 192.

ment, after a refusal so to do in the exercise of a judicial discretion;[1] nor to compel a judge to resettle a bill of exceptions;[2] nor to restore a person to the office of attorney or counsellor of the court, after dismissal therefrom by a court having jurisdiction of the matter;[3] nor to compel a court to set aside an order, duly entered, for the vacation of a judgment;[4] nor to compel a circuit court to proceed to execute a judgment from which an appeal has been duly taken to the Supreme Court;[5] nor to command a governor of a state to deliver up a fugitive from justice, under a requisition from the governor of another state;[6] nor can it perform the office of an appeal or writ of error.[7]

The General Principles and Practice Applicable to all Courts.

§ 506. The principles and practice generally applicable in case of mandamus are applicable to all courts, whether federal or state. The statute, as we have seen, gives the circuit and district courts power to issue the writ whenever necessary for the exercise of their respective jurisdictions, agreeable to the usages and principles of the common law. And whenever they have power for this purpose, the general principles and practice in such cases would be applicable; and the authorities we have cited, whether of the federal or state courts, will be equally applicable to any federal court, so far as they relate to the general doctrines and practice.[8]

[1] *Ex parte* Many, 14 How. 24.

[2] *In re* Streep, 156 U. S. 207.

[3] *Ex parte* Secombe, 19 How. 9; *In re* Green, 141 U. S. 325. But this is otherwise where the court had no jurisdiction: *Ex parte* Bradley, 7 Wall. 364; *Ex parte* Robinson, 19 *id.* 505; *Ex parte* Garland, 4 *id.* 378.

[4] *Ex parte* Ransom, 20 How. 581.

[5] United States *v.* Addison, 22 How. 174.

[6] Governor of Kentucky *v.* Governor of Ohio, 24 How. 66.

[7] *Ex parte* Schwaub, 98 U. S. 240; *Ex parte* Railway Co., 103 *id.* 794.

[8] On the general subject of mandamus, see High Ex. Rem., sections 29, 95–99, 124–127, 209, 225–226 *seq.*; also 2 Danforth's Dig. U. S. Sup. Ct., pp. 306–309.

CHAPTER XXI.

WRITS OF HABEAS CORPUS.

When Federal Courts may Issue.

§ 507. The Supreme Court,[1] the circuit courts of appeals, the circuit and district courts, and the several justices and judges thereof within their respective jurisdictions, have power to grant writs of *habeas corpus* for the purpose of inquiry into the cause of restraint of liberty;[2] but they will not issue for such a purpose where the party for whose benefit it is invoked is a prisoner in jail, unless "he is in custody under or by color of the authority of the United States,[3] or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof;[4] or is in custody in violation of the Constitution or of a law or treaty of the United States;[5] or, being a subject

[1] A petitioner for a *habeas corpus* before the Supreme Court must first as a rule exhaust his remedies in the lower courts: *Ex parte* Morgan, 119 U. S. 584; *In re* Lancaster, 137 *id.* 393; *In re* Duncan, 139 *id.* 449; *In re* Wood, 140 *id.* 278.

[2] Rev. Stat. §§ 751, 752. The circuit court has no jurisdiction to decide on *habeas corpus* where insane persons shall be confined, where there is no question of the legality of the restraint: King *v.* McLean Asylum, 64 Fed. Rep. 331; see also *Ibid.* 325. Commissioners of Alaska have power to grant writs of *habeas corpus* returnable before the district judge: Act of May 17, 1884, ch. 53, § 5, 1 Supp. R. S. 432. Judges of the U. S. Court in Indian Territory have power to issue writs of *habeas corpus:* Act of March 1, 1895, ch. 145, § 2, 2 Supp. R. S. 393. A circuit court of appeals cannot issue a writ of *habeas corpus* to be served in another circuit: *In re* Boles, 4 U. S. App. 1.

[3] An immigrant detained on board a vessel by order of customs officers is "in custody" within this clause: U. S. *v.* Chung Shee, 71 Fed. Rep. 277; 76 *id.* 951.

[4] A U. S. marshal or his deputies, arrested by state officers, for using force in executing process of U. S. courts, will be released upon *habeas corpus:* U. S. *v.* Lullhart, 47 Fed. Rep. 802; and see Kelly *v.* State of Georgia, 68 *id.* 652.

[5] The fact that a state statute is repugnant to the state Constitution will

or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under an alleged right, title, authority, privilege, protection or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."[1]

By the act of May 5, 1892,[2] prohibiting the coming of the Chinese into the United States, it is provided in § 5, "that after the passage of this act, on an application to any judge or court of the United States in the first instance for a writ of *habeas corpus* by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay." The judgment of a federal court on *habeas corpus* discharging a Chinese immigrant from custody on board a vessel, and allowing her to land, is conclusive of her right to come into the country.[3]

The application for the writ must be made by a complaint in writing, signed by the person for whose relief it is intended, and it must set forth the facts concerning the detention, in whose custody he is detained, and by virtue of what claim or authority

not authorize a U. S. court to issue a *habeas corpus* unless the petitioner is in custody by virtue of such statute and unless also the statute violates the U. S. Constitution: Andrews *v.* Swartz, 156 U. S 272. A U. S. court has no right to interfere by *habeas corpus* with the execution of the sentence of a state court which had jurisdiction of the offence and the prisoner under a constitutional state statute: Bergemann *v.* Backer, 157 *id.* 655. Except in cases of peculiar urgency the U. S. courts will not discharge the prisoner until a final determination of his case in the state courts, and will then usually leave him to his remedy by writ of error: Whitten *v.* Tomlinson, 160 U. S. 231; New York *v.* Eno, 155 *id.* 89; Cook *v.* Hart, 146 *id.* 183; *Ex parte* Skiles, 50 Fed. Rep. 524; and see *In re* Moore, 75 *id.* 821; Cf. *Ex parte* Jervey, 66 *id.* 957. Where a prisoner has been convicted and sentenced by a state court, the U. S. courts should not issue a *habeas corpus* unless it clearly appears that the state court had no jurisdiction or exceeded its jurisdiction: *In re* Friedrich, 149 U. S. 70. See also Neagle's Case, 135 *id.* 1; *Ex parte* Crondt, 112 *id.* 178; *Ex parte* Royall, 117 *id.* 241–255; *Ex parte* Fonda, *Ibid.* 516.

[1] Rev. Stat. § 753.

[2] Act of May 5, 1892, ch. 60, 27 Stat. L. 25, 2 Supp. R. S. 13.

[3] U. S. *v.* Chung Shee, 71 Fed. Rep. 277; 76 *id.* 951.

he is detained, if known, and these facts must be verified by the oath of the person making the application.[4]

It will be noticed that the complaint must be signed by the party restrained of his liberty, who must verify it. This is imperative; and an application for the writ made by his friends, without the authority of the party for whom it is made, will be denied.

In 1844 Thomas W. Dorr was tried and convicted, in the Supreme Court of Rhode Island, for treason against that state, and sentenced to the state's prison for life. On motion for a writ of *habeas corpus*, in the Supreme Court of the United States, affidavits were read to show that personal access to Dorr was refused, in consequence of which his authority could not be obtained for an application for the writ; and it was urged that there was no other mode of ascertaining whether or not it was Dorr's wish that the case should be brought before this court. But the motion was denied, because no court of the United States or judge thereof can issue a *habeas corpus* to bring up a prisoner who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness; and because it did not appear that the application was made by authority of Dorr or at his request.[1] The authority of a commissioner to issue a writ of *habeas corpus*, to take from jail a person committed by authority of the United States, and to bring him before him for the purpose of giving his deposition, to be used in a district court, has been denied;[2] and even the power of a judge or a

[1] Rev. Stat. § 754. Facts duly and distinctly alleged, and not denied in the return, or contradicted by other evidence, may be taken to be true: Kohl *v.* Lehlback, 160 U. S. 293. Proceedings on *habeas corpus* are civil and not criminal: *Ex parte* Lun Tong, 108 U. S. 556; *Ex parte* Costa, 110 *id.* 385.

The petition is wholly insufficient where copies of the information, verdict and judgment in the state court are not attached to it, nor the essential parts stated, nor a reason given for the omission: Craemer *v.* Washington, 18 Sup. Ct. Rep. 1.

[2] *Ex parte* Dorr, 3 How. 103 (1845). This decision was made previous to the act of Feb. 5, 1867, which expressly provided that the application should be made in writing, and the facts verified by the oath of the applicant. This act, in respect to the application, is substantially re-enacted by § 754 of the Revised Statutes: *In re* Hoyle, 9 A. L. Rec. 65. But see *In re* Ferrens, 3 Ben. 442, where it was held that the wife of the party in custody could make application for his discharge.

[3] *Ex parte* Barnes, 1 Sprague 133.

justice of a United States court to issue the writ in vacation, for the purpose of bringing the witness into court at an approaching term, has been questioned.[1]

Provisions of the Statute; Habeas Corpus and Certiorari.

§ 508. The provisions of the Revised Statutes above cited are a substantial re-enactment of the previous statutory provisions regulating the procedure in cases of *habeas corpus*, and they afford a plain guide in those cases to the proper practice where the original jurisdiction of the federal courts is invoked. The case of *Ex parte* Lange[2] will illustrate the practice in such cases, as well as the general principles of the law relating to this subject. The petitioner had been indicted, tried and convicted in the circuit court of the United States for the southern district of New York, for stealing, purloining, embezzling and appropriating to his own use certain mail-bags belonging to the Post Office Department. The value of the bags, as found by the jury, was less than twenty-five dollars, the punishment for which, as provided by statute, was imprisonment for not more than one year or a fine of not less than ten dollars nor more than two hundred dollars. The presiding judge sentenced the petitioner under said conviction to one year's imprisonment and to pay a fine of two hundred dollars, and he was committed to jail on said sentence, but on the day following his commitment his fine was paid to the clerk of the court, who subsequently paid the same into the treasury of the United States. The petitioner was the next day thereafter brought before the same judge on a writ of *habeas corpus*, when an order was entered vacating the former judgment, and he was again sentenced to one year's imprisonment from that date, and the return of the marshal showed that he held the prisoner under the latter sentence.

All this was done during the term at which he was tried and convicted. The *habeas corpus* issued by the circuit judge was returned into the circuit court and two district judges sat with him on the hearing, and the writ was discharged and the petitioner remanded to the custody of the marshal.

A petition was afterwards filed by the prisoner in the Supreme Court of the United States, praying for a writ of *habeas corpus*

[1] Conkling Pl. 247.

[2] 18 Wall. 163.

to said marshal, on the ground that he was unlawfully imprisoned under the order of said circuit court, on consideration of which that court was of opinion that the facts aforesaid, which he alleged therein, fairly raised the question whether the circuit court had not in the last aforesaid sentence, under which the prisoner was held, exceeded its powers; and it directed a writ to issue, and also a writ of *certiorari* to bring up the record in the circuit court under which the petitioner was restrained of his liberty. On a final hearing of the case the court decided that although it had no authority to review the judgments of inferior courts in criminal cases by the use of the writ of *habeas corpus* or otherwise,[1] yet it had power to look into the record of a case to determine whether the court had any power to render the judgment complained of, and to ascertain whether or not the court had exceeded its authority.[2]

On the question whether the court had authority to pass the second sentence under which the prisoner was held, the Supreme Court decided that the court below could not vacate the former judgment and impose another punishment on the prisoner; that the prisoner having paid into court the fine imposed upon him, and the money having passed beyond the control of the court, and the prisoner having also served several days of his imprisonment, all under a valid judgment, the court could not impose another punishment on the prisoner, as that would be to punish him twice for the same offence. The court said: "The law authorizes imprisonment not exceeding one year *or* a fine not exceeding two hundred dollars. The court through inadvertence imposed both punishments when it could rightfully impose but one. After the fine was paid and passed into the treasury, and the petitioner had suffered five days of his one year's imprisonment, the court changed its judgment by sen-

[1] United States *v.* Moore, 3 Cr. 170; Durousseau *v.* United States, 6 *id.* 307; *Ex parte* Kearney, 7 Wh. 42; *Ex parte* Watkins, 3 Pet. 193; Forsyth *v.* United States, 9 How. 571; *In re* Kaine, 14 *id.* 103; *Ex parte* Gordon, 1 Black 505.

[2] United States *v.* Hamilton, 3 Dall. 17; *Ex parte* Burford, 3 Cr. 448; *Ex parte* Bollman, 4 *id.* 75; *Ex parte* Watkins, 3 Pet. 193; *Ex parte* Watkins, 7 *id.* 568; *Ex parte* Metzger, 5 How. 176; *Ex parte* Kaine, 14 *id.* 103; *Ex parte* Wells, 18 *id.* 307; *Ex parte* Milligan, 4 Wall. 2; *Ex parte* McCardle, 6 *id.* 318; *Ex parte* McCardle, 7 *id.* 506; *Ex parte* Yerger, 8 *id.* 85.

tencing him to one year's imprisonment from that time. If this latter sentence is enforced it follows that the prisoner in the end pays his two hundred dollars fine and is imprisoned one year and five days, being all that the first judgment imposed on him and five days' imprisonment in addition." The prisoner was, therefore, discharged.

The Writ Not of Course; Jurisdiction Must be Shown.

§ 509. We have noticed that the issuance of the writ is not a matter of course. The party applying to the Supreme Court for the writ must first move the court for leave to file his petition for the writ: this motion must be accompanied with the petition he expects to file, setting out his case in full. The court passes upon the showing thus made and grants or denies the application: if granted these papers are considered by the court as the petition, etc., and the rule to show cause is issued, returnable to a day certain. The case is set for hearing when the return is made upon its sufficiency. The presence of the prisoner is not required, nor in fact desired by the court, and it is usually waived by the proper attorney and the proceedings are conducted till final action through him, dispensing entirely with the applicant's presence. The motion and papers must be printed and copies served on opposite counsel with notice of the time when the application is to be made. The court, in the exercise of original jurisdiction, may in a proper case issue the writ, but it should first appear that the court has power in the case to act; and where the cause of the imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.[1] This would be equivalent to a decision on a demurrer to the petition.

Allowance, Direction and Return of the Writ.

§ 510. It is the duty of the court or judge to whom the application is made to award the writ forthwith, unless it appears from the petition itself that the applicant is not entitled to it;

[1] *Ex parte* Milligan, 4 Wall. 2; *Ex parte* Watkins, 3 *id.* 192; *Ex parte* Kinney, 3 Hughes 9.

and it should be directed to the person in whose custody the party is detained.[1]

The party to whom it is directed should make due return thereof within three days thereafter, unless he be detained beyond the distance of twenty miles from the place where the return is required. If beyond that distance, and not more than one hundred miles, he is allowed ten days to make return; and if beyond the distance of one hundred miles, twenty days; and in making it he must certify the true cause of the detention, and bring the body of the person detained before the judge who granted the writ.[2]

When the writ is returned it is the duty of the court or judge to set a time for a hearing of the cause not exceeding five days thereafter, unless the party petitioning requests a longer time. The facts set forth in the return may be denied by the petitioner, or he may allege other facts that may be material to the case, but they must be under oath, and the return and all answers or denials may be amended by leave of the court or justice, or the judge, so as to present the material facts. The proceeding is in a summary way to determine the facts of the case; and after hearing the testimony and the arguments, the court or judge will dispose of the petitioner as law and justice require.[3]

If a party is held under a sentence of a court that had jurisdiction of the case, the petitioner cannot be released though there are errors in the proceedings.[4] And if a party has been committed for an alleged contempt of a court of competent jurisdiction, or by a court-marshal that had jurisdiction in the case, and it was within the sphere of its authority, he cannot be

[1] Rev. Stat. § 755; *Ex parte* Watkins, 3 Pet. 193; *Ex parte* Milligan, 4 Wall 2.

[2] Rev. Stat. §§ 756, 757, 758.

[3] Rev. Stat. §§ 760, 761.

[4] Johnson *v.* U. S., 3 McLean 89; *Ex parte* Parks, 93 U. S. 18; *Ex parte* Siebold, 100 *id.* 371; U. S. *v.* Pridgeon, 153 *id.* 48; *In re* Eckart, 166 *id.* 481. Where there is a remedy by writ of error or appeal, *habeas corpus* will not lie, except in rare and exceptional cases: *In re* Wilson, 140 U. S. 575; *In re* Delgado, *Ibid.* 586; *In re* Boyd, 4 U. S. App. 73; *In re* Belt, 159 U. S. 95; *In re* Schneider, 148 *id.* 162. Where a prisoner is wrongfully sentenced by a U. S. court to imprisonment in a state prison, he has a right to a *habeas corpus*. If the conviction is correct, the court which sentenced him should reassume jurisdiction: *In re* Bonner, 151 *id.* 242.

released on *habeas corpus;* nor can an inquiry be made into the sufficiency of the causes of the commitment.[1]

But if a party is imprisoned by the sentence of a court or a judge or a magistrate, and the sentence is void for want of authority to pronounce it, as where the law under which the prosecution was instituted was unconstitutional and void;[2] or where there was no authority for the magistrate, commissioner or other person to cause the arrest or imprisonment of the party, then there is ground for a discharge upon a hearing of the *habeas corpus*.[3]

Proceedings Governed by the Common Law.

§ 511. The proceedings upon the writ in the federal courts are governed by the common law of England, as it existed at the time of the adoption of the Constitution, except in respect to changes made by acts of Congress.[4] According to the doctrines of the common law, the decision of one court or magistrate refusing to discharge a prisoner was no bar to the issuing of other writs by other courts or magistrates having authority in such cases. And in case of a second or third investigation or inquiry into the cause of the detention, the court or magistrate can discharge the prisoner in the exercise of independent powers, notwithstanding his discharge may have been refused by other courts or magistrates on other writs.[5] Thus, where a person was arrested under an extradition treaty between the United States and Great Britain, and committed by a commissioner duly authorized to hear and determine the sufficiency of the charge made, and then a *habeas corpus* was sued out by the prisoner before a circuit court of the United States, which after a hearing

[1] *Ex parte* Kearney, 7 Wh. 38; *Ex parte* Reed, 100 U. S. 13; Johnson *v.* Sayre, 158 *id.* 109.

[2] Where a court is without authority to pass a particular sentence, such sentence is void and the defendant imprisoned under it may be discharged: *In re* Neilson, 131 U. S. 116; Cuddy's Case, *Ibid.* 280; *In re* Ayers, 123 *id.* 443; *In re* Sawyer, 124 *id.* 200.

[3] *Ex parte* Lange, 18 Wall. 163; *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Randolph, 2 Brock. 447; *Ex parte* Davis, 14 L. R. 301; *In re* Farez, 7 Blatch. 345; *In re* Tyler, 149 U. S. 164; *In re* Swan, 150 *id.* 637.

[4] *Ex parte* Watkins, 3 Pet. 193; *Ex parte* Randolph, 2 Brock. (C. C.) 447.

[5] *Ex parte* Kaine, 3 Blatch. (C. C.) 1; *Ex parte* Partington, 13 Mee. & W. 679; Canadian Prisoners' Case, 5 *id.* 32; The King *v.* Luddis, 1 East. 306; Burdett *v.* Abbott, 14 *id.* 91; Walson's Case, 9 A. & E. 731.

dismissed the writ and remanded the prisoner, it was held that this was no bar to an inquiry by a justice of the Supreme Court of the United States upon a writ of *habeas corpus* issued by him, to inquire into the legality of the detention of the prisoner under such commitment.[1]

The Court cannot Inquire into the Facts of the Case.

§ 512. Under the provisions of the Revised Statutes relating to the writ, it was urged in a certain case that, whatever may have been the law or the practice prior to its enactment, the courts now have power, on a return to the writ, to inquire into the merits of the case; that, taking into consideration all these provisions, it was the duty of the court to ascertain the facts on which the party is held, and to decide as an original question whether the prisoner ought to be held in custody, without regard to the previous decision of the court or magistrate by whose order he was committed. But the court decided that where a party was held on process issued on a final judgment of a court or on the order of an examining magistrate, it had no authority to inquire into the evidence which led to the conviction or detention of the party; that in determining upon *habeas corpus* the "facts" of the case, the court could not inquire into the facts which constitute the crime for which the party is convicted or detained; that it could not retry the case, but only consider whether the court or magistrate acquired jurisdiction of the matter, or whether they exceeded their jurisdiction, and whether they had any legal or competent evidence of facts before them on which to base a judgment as to the guilt of the accused.[2]

[1] *Ex parte* Kaine, 3 Blatch. (C. C.) 1.

[2] *In re* Joseph Stupp, 12 Blatch. (C. C.) 501 (1875); *In re* Frazer, 7 *id.* 34; *In re* Macdonnell, 11 *id.* 170; *In re* Stupp, *Ibid.* 124; *Ex parte* Geissler, 4 Fed. Rep. 188; *In re* Doig, *Ibid.* 193; Ornelas *v.* Ruiz, 161 U. S. 502; Bryant *v.* U. S., 167 *id.* 104.

In inquiring "into the cause of restraint of liberty," the district court may inquire whether the prisoner has committed a crime against the United States, and whether the court in which he was indicted had jurisdiction thereof. If not, he should be discharged: U. S. *v.* Fowkes, 3 U. S. App. 247.

If sufficient ground for holding the prisoner be shown he will not be released on account of defects in the original arrest or commitment: Nishimurer Ekin *v.* U. S., 142 U. S. 651; Iasigi *v.* Van De Carr, 166 *id.* 391.

Where a U. S. commissioner commits a person for trial in another district, the question of his identity cannot be reviewed on *habeas corpus:* Horner *v.* U. S., 143 U. S. 207.

Questions of this character have most frequently been presented in the execution of judicial duties under extradition treaties, where the person is held in custody under a commitment by a commissioner. The decision in the case last cited followed the current of previous decisions on this subject. Thus in *Ex parte* Van Aernam[1] it was held that the circuit court could not sit in review on the merits of the decision made by a commissioner in an extradition case, in respect to either the facts or the law.[2] But the decisions on this question have not been entirely clear or harmonious.[3] In a case just cited,[4] Judge Blatchford reviewed the decisions and furnished an able exposition of the law on this subject. He observes: "The court issuing the writ must inquire and adjudge whether the commissioner acquired jurisdiction of the matter by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction, and whether he had any legal or competent evidence of facts before him on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusions."[5] Under this decision error in law in the admission or exclusion of evidence before the commissioner would not be considered, provided there was any legal or competent evidence of facts on which to base the judgment.

Appeals.

§ 513. Section 763 of the Revised Statutes provided for appeals, in certain cases, to the circuit courts as follows: "From the final decisions of any court, justice or judge inferior to the circuit court for the district in which the cause is heard:

"1. In the case of any person alleged to be restrained of his

[1] 3 Blatch. (C. C.) 160.

[2] See also *In re* Ventremaitre, 9 N. Y. Leg. Obs. 137; *In re* Heilbron, 12 *id.* 65.

[3] *In re* Heinrich, 5 Blatch. (C. C.) 414, where it was held that in such cases the court could not only look into and pass upon the competency of evidence, but also its weight. See also *In re* Kaine, 14 How. 142.

[4] *In re* Joseph Stupp, 12 Blatch. (C. C.) 501. While in custody under a writ of *habeas corpus* he cannot be arrested on a second warrant: *In re* Francois Farez, 7 Blatch. 345.

[5] This doctrine was affirmed by the Supreme Court in *In re* Cortes, 136 U. S. 330; Stevens *v.* Fuller, *Ibid.* 468; Horner *v.* U. S. 143 *id.* 570; *Ex parte* Rickelt, 61 Fed. Rep. 203.

liberty in violation of the Constitution or of any law or treaty of the United States.

"2. In the case of any prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed, or confined, or in custody by or under the authority or law of the United States, or of any state, or process founded thereon, for or on account of any act done or omitted under an alleged right, title, authority, privilege, protection or exemption set up or claimed under the commission, order or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof." Except in the cases provided therein, no appeal lay to a circuit court from a decision of the district court on an application for a *habeas corpus*.[1] By the act of March 3, 1891, the appellate jurisdiction of the circuit court was abolished, and all appeals are taken to the Supreme Court or the circuit court of appeals. The right to appeal directly to the Supreme Court was taken away by this act, except in the cases mentioned in section 5, as amended by the act of January 20, 1897, which gave an appeal direct in cases of conviction of a capital crime only; cases of infamous crimes not capital are appealed to the circuit court of appeals.[2] Where a person is restrained in violation of the Constitution, or a law or treaty of the United States an appeal lies direct to the Supreme Court.[3]

§ 514. It was further provided by section 764 of the Revised Statutes, as amended by the act of March 3, 1885, that an appeal might be taken from the final decision of a circuit court, in the cases described in the preceding section.[4]

[1] Seavy *v.* Seymour, 3 Cliff. 439.

[2] *In re* Lennon, 150 U. S. 393; McKnight *v.* James, 155 *id.* 685.

[3] An appeal to the Supreme Court direct does not lie from the decision of a district judge in chambers, refusing a writ of *habeas corpus*: *In re* Buchanan, 146 N. Y. 264; McKane *v.* Durston, 153 U. S. 684.

[4] Act of March 3, 1885, ch. 353, 1 Supp. R. S. 485. Appeals under this amendment bring up the whole case, law and facts, for re-examination: Neagle's Case, 135 U. S. 1; Homer's Case, 143 *id.* 570. The Supreme Court has no jurisdiction over judgments on *habeas corpus* of the Supreme Court of the District of Columbia: Cross *v.* Burke, 146 U. S. 82; *In re* Schneider, 148 *id.* 157. Otherwise with respect to judgments of the Supreme Court of New Mexico: Gonzales *v.* Cunningham, 164 *id.* 612. But where the Supreme Court of the District of Columbia is without jurisdiction and a writ of error does not lie, the Supreme Court of the U. S. may issue a writ of *habeas corpus*: *In re* Chapman, 156 *id.* 211.

Under the provisions of former acts of Congress, substantially embodied in the foregoing sections, it has been held that, notwithstanding the provision made for appeal to the Supreme Court from the final decision of the circuit court, on *habeas corpus*, brought to such court by appeal from the decision of a "court, justice or judge inferior to the circuit court," they did not exclude the appellate jurisdiction of the Supreme Court in cases where the circuit court exercised original jurisdiction on *habeas corpus*.[1] Although the limitation made by section 764 of the Revised Statutes would cut off any right of appeal of the cases described in the first clause of the preceding section, it would not affect the right of appeal in those cases where the circuit court exercised original jurisdiction. They would fall within the reason and the principle of the cases last cited, and the right to an appeal would be clear. In *Ex parte* McCardle, Chase, C. J., who gave the opinion of the court, observed: "From decisions of a judge or a district court appeals lie to the circuit court, and from the circuit court to this court. But each circuit court, as well as each district court and each judge, may exercise the original jurisdiction; and no satisfactory reason can be assigned for giving appeals to this court from the circuit court rendered on appeal, and not giving like appeals from judgments of circuit courts rendered in the exercise of original jurisdiction. If any class of cases was to be excluded from the right of appeal, the exclusion would naturally apply to cases brought into the circuit court by appeal rather than to cases originating there. In the former description of cases the petitioner for the writ, without appeal to this court, would have the advantage of at least two hearings, while in the latter, upon the hypothesis of no appeal, the petitioner would have but one." [2]

This interpretation of the statutes was followed in *Ex parte* Yerger,[3] where the broad proposition was maintained that the appellate jurisdiction of the Supreme Court in such cases was

[1] *Ex parte* McCardle, 6 Wall. 318 (1867); *Ex parte* Yerger, 8 *id.* 85 (1868).

[2] As to the power of the Supreme Court and of district and circuit courts, and the justices and judges thereof, to issue writs of *habeas corpus* in the exercise of original jurisdiction, see Rev. Stat. §§ 751, 752; *ante*, § 508.

[3] 8 Wall. 85.

conferred by the Constitution, except such as come within some limitations of the jurisdiction by acts of Congress; and there being no such limitation applicable to appeals from the original cognizance of the circuit court in *habeas corpus* cases, that court could entertain jurisdiction of such appeals. In this case the court further held that on appeals it had jurisdiction to inquire into the lawfulness of the detention and relieve from it if found unlawful, even where the detention complained of was not by virtue of civil authority nor under the order of an inferior court, but by military officers for a trial before a military tribunal, and after an examination into the cause of the detention by the inferior court, resulting in an order remanding the prisoner to custody.

In Cases Involving the Law of Nations.

§ 515. It is further provided that "when a writ of *habeas corpus* is issued in the case of any prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed or confined or in custody by or under the authority or law of any one of the United States, or process founded thereon, on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations, notice of the said proceedings, to be prescribed by the court or justice or judge at the time of granting said writ, shall be served on the Attorney-General or other officer prosecuting the pleas of said state, and due proof of such service shall be made to the court or judge before the hearing."[1]

Appeals, How Taken.

§ 516. Appeals on *habeas corpus* can only be taken on "such terms and under such regulations and orders, as well as for the custody and appearance of the person alleged to be in prison, or confined, or restrained from his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings, as may be prescribed by the Supreme Court, or, in default thereof, by the court or judge hearing the cause."[2] And pending the proceedings or appeal, "and until final judgment therein, and after final judg-

[1] Rev. Stat. § 762.

[2] Rev. Stat. § 765.

ment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any state court, or by or under the authority of any state, for any matter so heard and determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void: *provided*, that no such appeal shall be had or allowed after six months from the date of the judgment or order complained of."[1]

Custody of Prisoners on Habeas Corpus.

§ 517. The Supreme Court ordered that the following regulations be established under section 765 of the Revised Statutes:

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.[2]

2. Pending an appeal from the final decision of any court or judge, discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.[3]

[1] Rev. Stat. § 766, as amended by act of March 3, 1893, ch. 226, 27 Stat. L. 751, 2 Supp. R. S. 135.

[2] The fact that the prisoner is required to perform hard labor pending the appeal does not authorize any intervention: *In re* McKane, 61 Fed. Rep. 205.

[3] Rule 34, promulgated March 29, 1886; and, as amended, May 10, 1886, 117 U. S. 708; Carper *v.* Fitzgerald, 121 *id.* 87, denies the right of appeal to the Supreme Court in a *habeas corpus* case from an order of a circuit judge of the U. S. sitting as a judge and not as a court and explains Rule 34, Supreme Court as applying to proceedings on appeals under section 763 from the decision of the judge to the circuit court of the district, as well as under section 764 as amended by the act of March 3, 1885, from the circuit court to the Supreme Court.

A district judge who has denied a writ of *habeas corpus* to release a foreign consul imprisoned under state authority has no power under Rev. Stat. § 765 and Sup. Ct. Rule 34, to admit the prisoner to bail pending an appeal from the order denying the writ: *In re* Iasigi, 79 Fed. Rep. 755.

CHAPTER XXII.

PROCEDURE IN CRIMINAL CASES.

Practice in Criminal Cases.

§ 518. We have in the preceding chapter pointed out the practice and procedure in certain cases where the offenders against the United States may be brought before United States commissioners and other magistrates designated for this purpose, for a preliminary examination into the charges preferred against them, under section 1014 of the Revised Statutes, which authorizes an arrest, examination and discharge or imprisonment or bail of such offenders by such magistrates, as the case may require, for their appearance for trial before such court of the United States as by law has cognizance of the offence;[1] and we now proceed to consider the practice and procedure in such courts in criminal cases.[2]

Provisions of the Statutes for Criminal Procedure.

§ 519. The statutes of the United States provide:

INDICTMENTS.[3]—*Sec.* 1821. No indictment shall be found, nor

[1] As to issuing process to a marshal of another district under Rev. Stat. § 725 and § 1014, see *In re* Manning, 44 Fed. Rep. 275.

[2] We have already considered the jurisdiction of the circuit and district courts in such cases. It may be observed that, although bail cannot be taken by a United States commissioner, or the magistrates provided by § 1014 of the Revised Statutes, where the punishment may be death, yet in such cases it may be taken by the Supreme Court of the United States, or a circuit court, or by a justice of the Supreme Court, a circuit judge or a judge of a district court, who may exercise their discretion therein, having regard to the nature and circumstances of the offence, and of the evidence and the usages of the law: Rev. Stat. § 1016; United States *v.* Burr, Burr's Trial 310; United States *v.* Hamilton, 3 Dall. 17.

[3] An indictment is the presentation to the proper court, under oath by a grand jury duly empanelled, of a charge describing an offence against the law for which the party charged may be punished: *In re* Hart, 25 U. S. App. 22.

shall any presentment be made, without the concurrence of at least twelve grand jurors.

OFFENCES AGAINST THE ELECTIVE FRANCHISE.—*Sec.* 1022. All crimes and offences committed against the provisions of chapter 7, title "Crimes," which are not infamous, may be prosecuted either by indictment or by information filed by a district attorney.

PERJURY BEFORE A COURT-MARTIAL.—*Sec.* 1023. In prosecutions for perjury committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offence charged on the defendant, without setting forth the authority by which the court was held, or the particular matters brought before, or intended to be brought before, said court.

CHARGES JOINED IN ONE INDICTMENT.—*Sec.* 1024. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts;[1] and if two or more indictments are found in such cases, the court may order them to be consolidated.[2]

INDICTMENTS; DEFECTS OF FORM.—*Sec.* 1025. No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.[3]

[1] See McElroy *v.* U. S., 164 U. S. 76; Pointer *v.* U. S., 151 *id.* 396; Ingraham *v* U. S., 155 *id.* 434. A single act or transaction may be charged in a count, although it may involve similar violations of law by other persons: U. S. *v.* Scott, 74 Fed. Rep. 213.

[2] If all the counts might originally have been included in one indictment, the indictments may be consolidated: Turner *v.* U. S., 30 U. S. App. 90. See also Logan *v.* U. S. 144 U. S. 263; U. S. *v.* Jones, 69 Fed. Rep. 973; Turner *v.* U. S., 66 *id.* 280; U. S. *v.* Cadwallader, 59 *id.* 677. If the court consolidates the indictments its action cannot be attacked on *habeas corpus* proceedings: Howard *v.* U. S., 75 Fed. Rep. 986. An objection to consolidation should be made at the time; it is too late after verdict: Logan *v.* U. S., 144 U. S. 263.

[3] See Frisbie *v.* U. S., 157 U. S. 160; Moore *v.* U. S., 160 *id.* 268; Markham *v.* U. S., *Ibid* 319; U. S. *v.* Potter, 56 Fed. Rep. 83. A general judg-

JUDGMENT ON DEMURRER TO AN INDICTMENT.—*Sec.* 1026. In every case in any court of the United States where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be respondeat ouster; and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require.

SEVERAL INDICTMENTS AGAINST THE SAME PERSON; ONE WRIT SUFFICIENT.—*Sec.* 1027. When two or more charges are made or two or more indictments are found against any person, only one writ or warrant shall be necessary to commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offences, or to refer to them only in very general terms.

COPY OF WRIT TO BE JAILOR'S AUTHORITY.—*Sec.* 1028. Whenever a prisoner is committed to a sheriff or jailor by virtue of a writ, warrant or mittimus, a copy thereof shall be delivered to such sheriff or jailor as his authority to hold the prisoner, and the original writ, warrant or mittimus shall be returned to the proper court or officer, with the officer's return thereon.[1]

WRIT FOR REMOVAL OF A PRISONER FROM ONE DISTRICT TO ANOTHER.—*Sec.* 1029. Only one writ or warrant is necessary to remove a prisoner from one district to another. One copy thereof may be delivered to the sheriff or jailor from whose custody the prisoner is taken, and another to the sheriff or jailor to whose custody he is committed, and the original writs, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed.

NO WRIT NECESSARY TO BRING INTO COURT A PERSON IN CUSTODY.—*Sec.* 1030. No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal.

PEREMPTORY CHALLENGES.—*Sec.* 1031. If, in the trial of a capital offence, the party indicted peremptorily challenges jurors

ment upon an indictment containing several counts and a verdict of guilty on each count cannot be reversed in error if any count is good and sufficient to support the judgment: Claassen *v.* U. S., 142 U. S. 140.

[1] See U. S. *v.* Van Duzee, 10 U. S. App. 395.

above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made.

PRISONERS STANDING MUTE, ETC.—*Sec.* 1032. When any person indicted for any offence against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury.[1]

COPY OF INDICTMENT, ETC., DELIVERED TO PRISONER.—*Sec.* 1033. When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offence, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial.[2]

COUNSEL AND WITNESSES FOR DEFENDANT.—*Sec.* 1034. Every person who is indicted of treason, or other capital crime, shall be allowed to make his full defence by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have access to him at all seasonable hours. He shall be allowed in his defence to make any proof that he can produce by lawful witnesses, and

[1] In trials for felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial; the making of challenges is an essential part of the trial of a person accused of crime, and it is one of his substantial rights to be brought face to face with the jurors when the challenges are made; though no specific exception was taken by the prisoner based upon the fact that he was called upon to challenge jurors not before him, a general exception, taken to the action of the court in prescribing the method of procedure, was held sufficient: Lewis *v.* U. S., 146 U. S. 370.

[2] See Logan *v.* U. S., 144 U. S. 263. Notice need not be given of the names of witnesses called in rebuttal: Goldsby *v.* U. S., 160 *id.* 70.

shall have the like process of the court to compel his witnesses to appear at his trial as is usually granted to compel witnesses to appear on behalf of the prosecution.

VERDICT OF LESS OFFENCE THAN CHARGED.—*Sec.* 1035. In all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged; *provided*, that such attempt be itself a separate offence.[1]

VERDICT AGAINST PART OF SEVERAL JOINT DEFENDANTS.—*Sec.* 1036. On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury.[2]

INDICTMENTS REMITTED BY CIRCUIT AND DISTRICT COURTS TO EACH OTHER.—*Sec.* 1037. Whenever the district attorney deems it necessary, any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of

[1] The jury may convict the defendant of a lesser crime, which is necessarily included in the one charged, but the evidence must justify such conviction: Snarf *v.* U. S., 156 U. S. 51.

[2] See Logan *v.* U. S., 144 U. S. 263, and Simmons *v.* U. S., 142 *id.* 148, as to discharging jury and putting party on trial by another jury; and see latter case as to the right of the presiding judge at a trial, civil or criminal, to express his opinion to the jury upon the question of fact submitted to them.

In Mattox *v.* U. S., 146 U. S. 140, is a discussion as to the trial court excluding affidavits in support of a motion for a new trial, and reversal of the case for that; and also as to receiving testimony of jurors to set aside their verdict.

Two or more persons jointly charged in the same indictment with a capital offence have not a right by law to be tried separately, without the consent of the prosecutor, but such separate trial is a matter to be allowed in the discretion of the court: U. S. *v.* Marchant and Colson, 12 Wh. 480; and when a severance in such case is ordered, one of the accused, whose case is undisposed of, may be called and examined as a witness on behalf of the government against his co-defendant: Benson *v.* U. S., 146 U. S. 325.

The act of March 16, 1878, ch. 37, 20 Stat. L. 30, 1 Supp. R. S. 155, having provided that a person charged with the commission of crime may, at his own request, be a competent witness on the trial, but that "his failure to make such request shall not create any presumption against him," all comment upon such failure must be excluded from the jury: Wilson *v.* U. S., 149 U. S. 60.

the district court of the same district, where the offence charged in the indictment is cognizable by the said district court. And in like manner any district court may remit to the next session of the circuit court of the same district any indictment pending in the said district court. And such remission shall carry with it all recognizances, processes and proceedings pending in the case in the court from which the remission is made; and the court to which such remission is made shall, after the order of remission is filed therein, act in the case as if the indictment, and all other proceedings in the same, had been originated in said court.

REMISSION FROM DISTRICT TO CIRCUIT COURT OF DIFFICULT CASES.—*Sec.* 1038. Any district court may, by order entered on its minutes, remit any indictment pending there into the next session of the circuit court for the same district, when, in the opinion of such district court, difficult and important questions of law are involved in the case; and thereupon the proceedings in such case shall be the same in the circuit court as if such indictment had been originally found and presented therein.

ALL CAPITAL CASES REMITTED FROM DISTRICT TO CIRCUIT COURTS.—*Sec.* 1039. Every indictment of a capital offence, presented to a district court, together with the recognizances taken therein, shall, by order entered on its minutes, be remitted to the next session of the circuit court for the same district; and, on the filing of such order and indictment with the clerk of such circuit court, that court shall proceed thereon in tbe same manner as if said indictment had been originally found and presented therein.

CAPITAL CASE CARRIED TO THE SUPREME COURT.—*Sec.* 1040. Whenever a judgment of death is rendered in any court of the United States, and the case is carried to the Supreme Court in pursuance of law, the court rendering such jndgment shall, by its order, postpone the execution thereof from time to time and from term to term, until the mandate of the Supreme Court in the case is received and entered upon the record of such lower court. In case of affirmance by the Supreme Court, the court rendering the original judgment shall appoint a day for execution thereof; and in case of reversal, such further proceedings shall be had in the lower court as the Supreme Court may direct.

JUDGMENTS FOR FINES, HOW COLLECTED. — *Sec.* 1041. In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced; *provided*, that where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid.

What Crimes are Infamous.

§ 520. It will be observed that by the provisions of section 1022 of the statutes, crimes "which are *not infamous* may be prosecuted by indictment or by information filed by a district attorney."

This term has received a construction derived from the doctrines of the common law, by which a person was made infamous by the crimes of treason, felony and the *crimen falsi*, in which latter case it was not infamous unless it not only involved the charge of falsehood, but also injuriously affected the public administration of justice by the introduction therein of falsehood and fraud.[1] It does not necessarily follow that crimes that may be punished by imprisonment in the penitentiary are infamous;[2] as it is the nature of the act and not the character of the punishment which makes the crime infamous.[3] And offences which are merely misdemeanors cannot by any construction of the statute be considered infamous.[4]

Consolidation where there are Two or More Offences.

§ 521. Section 1024 of the statutes provides for consolidation of various charges against a defendant and of two or more indictments in certain cases.

[1] United States *v.* Block, 4 Saw. 211.

[2] United States *v.* Maxwell, 3 Dill. 275.

[3] United States *v.* Sawyer, 4 Saw. 211.

[4] United States *v.* Ebert, 1 Cent. L. J. 205; United States *v.* Waller, 1 Saw. 701; United States *v.* Baugh, 1 Fed. Rep. 784. As to what constitutes an infamous crime, see Martin *v.* U. S., 117 U. S. 348; *In re* Claasen, 140 *id.* 200.

Under this provision several offences arising out of one transaction may be charged in one indictment in different counts, although some of them are declared to be felonies, while others are not so designated;[1] and separate counts charging distinct and different felonies alleged to have been committed at different times and places may be joined in one indictment.[2] The same offence may also be charged in different ways in several counts in the same indictment to meet the facts of the case, as well as several distinct felonies of the same degree where they were committed at different times.[3]

In an indictment for passing counterfeit coin several counts may be inserted charging the passing of counterfeit coin at different times and on different occasions;[4] and a count for making false coins may be joined with a count for aiding and assisting some other person in such making, and causing and procuring some other person to make such coins.[5] So a count for an assault and battery may be joined with a count for a riot in the same indictment, if the transactions were the same or connected together;[6] but a count for a conspiracy cannot be joined with one for murder in the same indictment, unless it is shown that they refer to "the same act or transaction," or that they all are "acts or transactions connected together."[7]

If the offence charged is in its nature several only, several persons cannot be jointly charged in the indictment with it;[8] and if there are several offences charged in one indictment and a general verdict or plea of guilty is entered, a judgment can only be entered for a single offence.[9]

[1] United States *v.* Jacoby, 12 Blatch. 491; United States *v.* Dickinson, 2 McLean 325.

[2] United States *v.* Young, 4 C. L. N. 10; United States *v.* Burnes, 5 McLean 23.

[3] United States *v.* Pirates, 5 Wh. 184; United States *v.* O'Callahan, 6 McLean 596; United States *v.* Brent, 17 I. R. R. 54.

[4] United States *v.* O'Callahan, 6 McLean 596.

[5] United States *v.* Burnes, 5 McLean 23.

[6] United States *v.* McFarlane, 1 Cr. (C. C.) 163.

[7] United States *v.* Scott, 4 Biss. 29.

[8] United States *v.* Kazinski, 2 Sprague 7. By the act of May 17, 1879, ch. 8, 21 Stat. L. 4, 1 Supp. R. S. 264, all parties to conspiracies to defraud the United States are liable if one does an act.

[9] United States *v.* Maguire, 3 Cent. L. J. 273; United States *v.* Blaisdell, 3 Ben. 132.

Defects of Form in Indictments.

§ 522. Imperfection and defects in matters of form in an indictment which do not tend to the prejudice of the defendant will not make it insufficient or affect the trial, judgment or other proceeding thereon.[1] If the meaning of the language of an indictment can be understood as charging a crime, it will be good although there may be a mistake in expressing the substance of it.[2] But an omission to state in the indictment anything which is a part of the description of the crime is a material and substantial, and not a mere formal matter, and such an indictment is defective;[3] and an indictment which merely sets forth a paper upon which the crime charged is based, by a description of its contents instead of in *hæc verba*, would be held bad on a motion in arrest of judgment.[4] It is sufficient as a general rule if the indictment charges the offence in the language of the statute,[5] but not sufficient unless the words of the statute fully and clearly set forth all the elements necessary to constitute the offence.[6] If the court amends an indictment after it has been found and returned by the grand jury there can be no conviction on it.[7]

Copy of Indictment in Treason and Other Capital Cases, with a List of the Jurors and Witnesses, to be Delivered to the Defendant.

§ 523. It will be observed that the statute requires that when a person is indicted for treason, a copy of the indictment and a list of the jury and of the witnesses to be produced on the trial for proving the indictment, stating the abode of each juror and witness, shall be delivered to him at least three days before he is tried for the same; and when indicted for any other capital offence, such copy of the indictment and list of jurors and wit-

[1] Rev. Stat. § 1025; United States *v.* Tuska, 14 Blatch. 5.

[2] United States *v.* Jackson, 2 Fed. Rep. 522. See also United States *v.* Noelke, 1 *id.* 426.

[3] United States *v.* Conant, 9 Cent. L. J. 129.

[4] United States *v.* Noelke, *supra.* See also United States *v.* Kruikshank, 92 U. S. 542; United States *v.* Jacoby, 12 Blatch. 491.

[5] *Ex parte* Yarbrough, 110 U. S. 651; U. S. *v.* Hess, 124 *id.* 483.

[6] U. S. *v.* Carll, 105 U. S. 611.

[7] *Ex parte* Bain, 121 U. S. 1.

nesses shall be delivered to him at least two entire days before the trial.[1]

It is not sufficient under this provision that, in case of an indictment for treason, the notice contain a mere statement of the counties where the jurors and witnesses reside, but the particular place in the county and state of their residence should be stated, that the accused may prepare for his defence and be enabled to identify the jurors who are to try and the witnesses who are to prove the indictment against him.[2]

In other capital causes the copy of the indictment must be delivered at least two days before the cause is tried by a jury, but not two days before he is arraigned on the indictment. The arraignment of a prisoner is no part of the trial, but only a preliminary proceeding, and until the arraignment and plea it cannot be ascertained whether there will be a trial or not.[3]

Offences Not Capital.

§ 524. In the case of the indictment of persons for offences not capital, it is not required that the prisoners be furnished with a copy of the indictment at the expense of the government.[4] As the right to claim a copy of the indictment is not a common law right, and rests wholly upon the statute, the construction given to the statute could well rest upon the familiar maxim, *expressio unius exclusio alterius.*

But in such cases a copy may, in the discretion of the court, be ordered to be delivered to the prisoner where it is shown to be important to his pleading or defence;[5] and the court may also order a list of the witnesses sworn before the grand jury to be furnished to the accused.[6]

Defendant May be Found Guilty of a Less Offence.

§ 525. In all criminal cases the defendant may be found guilty of any offence which is necessarily included in that with which

[1] Rev. Stat. § 1033; Hickory *v.* U. S., 151 U. S. 303. This section does not control the practice in the local courts of a territory: Thiede *v.* Utah Ty., 159 *id.* 510.

[2] United States *v.* Insurgents, 2 Dall. 335; s. c., Whart. St. Tr. 102; United States *v.* Stuart, 2 Dall. 343.

[3] Rev. Stat. § 1033; United States *v.* Curtis, 4 Mas. 232.

[4] United States *v.* Blackford, 4 Blatch. 337; United States *v.* Hare, 2 Wheel. Cr. Cas. 283.

[5] United States *v.* Curtis, 4 Mas. 232; United States *v.* Williams, *supra.*

[6] United States *v.* Southmayd, 6 Biss. 321.

he is charged in the indictment, or of an attempt to commit the offence charged in it.[1] Therefore, upon the trial of an indictment for murder a verdict of manslaughter will be good, as the crime of murder necessarily includes the crime of manslaughter.[2]

Indictments Remitted from the Circuit and District Courts to Each Other.

§ 526. Indictments may be remitted from the circuit to the district courts, and *vice versa*, from the district to the circuit courts, in certain cases.[3] Under the provision of the section last cited a cause may be remitted on a proper motion of the district attorney from the circuit court to the district court, and afterwards back to the circuit court. Thus, where an indictment was found in the circuit court, and was on motion of the district attorney remitted to the district court under the provisions of this section, and after a demurrer to the indictment was filed by the defendant it was, on a similar motion of the district attorney, remitted back to the circuit court from whence it originally came, and the United States there joined in the demurrer, and on the question as to the jurisdiction of the circuit court the judges were divided in opinion, and the point was certified to the Supreme Court, it was there held that the transfer of the indictment as aforesaid was authorized, and that the circuit court had jurisdiction.[4]

But the circuit court has no authority under the statute to remit a cause to the district court on its own motion or on the motion of the defendant; it can only be remitted on motion of the district attorney.[5] The statute provides for the transmission of criminal causes, with the proceedings therein, but does not prescribe the particular form in which the record should be sent, and it has been held that a certified copy of it was sufficient for this purpose.[6]

[1] Rev. Stat. § 1035.

[2] United States *v.* Leonard, 2 Fed. Rep. 669. And by the act of Jan. 15, 1897, ch. 29, 29 Stat. L. 487, 2 Supp. R. S. 538, the jury, in certain murder and rape cases, may qualify a verdict of guilty by adding thereto "without capital punishment."

[3] Rev. Stat. § 1037.

[4] United States *v.* Murphy, 3 Wall. 649. See also United States *v.* Morris, 1 Curt. 23.

[5] United States *v.* Burnett, 16 Blatch. 338.

[6] United States *v.* McKee, 4 Dill. 1.

Remission from District to Circuit Court of Difficult Cases.

§ 527. The statute provides for the remission of criminal cases from the district to the circuit court for the same district when, in the opinion of the district court, difficult and important questions of law are involved in the case.[1] Under this provision it seems to be left for the district court to decide whether or not there are important questions of law involved in the case, and whether the court will enter an order for the remission. To authorize a remission on this ground the question of law should be of manifest grave importance, and the mere fact that the district judge may have given a particular exposition of a statute on which the question rests should not control the court in its action, when it is not made to appear that his exposition is in conflict with the views of any other court.[2] The district court may, in a proper case, remit an indictment, even after the adjournment of the term at which the indictment was found.[3]

Judgments for Fines; how Collected.

§ 528. The statute provides that a judgment for a fine or penalty, whether alone or with any other kind of punishment, may be enforced by execution against the property of the defendant in the same manner as judgments in civil cases are enforced.[4] If the judgment provides that the defendant shall stand committed until the fine is paid, a *capias pro* fine may be issued; and if nothing is said in the judgment concerning the mode of executing it, the district attorney may elect to issue a *fi. fa.* or a *capias pro* fine.[5] If the defendant is sentenced to pay a fine he may be committed to jail until the fine is paid.[6]

[1] Rev. Stat. § 1038.

[2] United States *v.* O'Sullivan, 9 N. Y. Leg. Obs. 193.

[3] United States *v.* Morris, 1 Curt. 23.

[4] Rev. Stat. § 1041.

[5] *Ex parte* Louis Feuscher, 23 I. R. R. 202.

[6] United States *v.* Robins, 15 I. R. R. 155.

CHAPTER XXIII.

PROVISIONS OF THE REVISED STATUTES REGULATING PROCEDURE IN THE FEDERAL COURTS.

§ 529. We have considered the subject of procedure in treating of the Supreme Court and the circuit and district courts; but for convenience of reference we insert the provisions of the statutes relating to this subject:

SEALING AND TESTING OF WRITS.—*Sec.* 911. All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court or a circuit court shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence; and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof. The seals of the said courts shall be provided at the expense of the United States.[1]

TESTE OF PROCESS, DAY OF.—*Sec.* 912. All process issued from the courts of the United States shall bear teste from the day of such issue.[2]

MESNE PROCESS, AND PROCEEDINGS IN EQUITY AND ADMIRALTY. —*Sec.* 913. The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and

[1] A notice to a garnishee is not "process" under this section: Wile *v.* Cohn, 63 Fed. Rep. 759.

[2] Atherton *v.* Fowler, 91 U. S. 143; Kitchen *v.* Randolph, 93 *id.* 87; Wentz *v.* Hoagland, 105 *id.* 702.

addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States.

OTHER THAN EQUITY AND ADMIRALTY CAUSES.—*Sec.* 914. The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.[1]

ATTACHMENTS.—*Sec.* 915. In common law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: *provided*, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy.[2]

EXECUTIONS IN COMMON LAW CAUSES AND SALE OF REAL ESTATE. —*Sec.* 916. The party recovering a judgment in any common law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

[1] Conditions may arise in removed causes which render the state practice inapplicable: Phœnix Ins. Co. *v.* Charleston Bridge Co., 25 U. S. App. 190.

[2] See Citizens' Bk. of Wichita *v.* Farwell, 12 U. S. App. 409; Kern *v.* H. B. Claflin Co., 13 *id.* 707; Centr. Trust Co. *v.* Chattanooga, R. & C. R. Co., 68 Fed. Rep. 685.

The act of March 3, 1893,[1] provides: "That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the court house of the county, parish or city in which the property, or the greater part thereof, is located or upon the premises, as the court rendering such order or decree of sale may direct.

"SEC. 2. That all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree it would be best to sell it in some other manner.

"SEC. 3. That hereafter no sale of real estate under any order, judgment or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided for to be made in such other papers as may seem proper."

POWER OF THE SUPREME COURT TO REGULATE THE PRACTICE OF CIRCUIT AND DISTRICT COURTS.—*Sec.* 917. The Supreme Court shall have power to prescribe from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts.

PRACTICE IN THE SEVERAL COURTS TO BE REGULATED BY THEIR OWN RULES.—*Sec.* 918. The several circuit and district courts

[1] Act of March 3, 1893, ch. 225, 27 Stat. L. 751, 2 Supp. R. S. 135.

may from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

SUITS FOR DUTIES, IMPOSTS, TAXES, PENALTIES OR FORFEITURES. —*Sec.* 919. All suits for the recovery of any duties, imposts or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States.

CONSOLIDATION OF REVENUE SEIZURES.—*Sec.* 920. Whenever two or more things belonging to the same person are seized for an alleged violation of the revenue laws, the whole must be included in one suit; and if separate actions are prosecuted in such cases, the court shall consolidate them.

ORDERS TO SAVE COSTS.—*Sec.* 921. When causes of a like nature or relative to the same question are pending before a court of the United States, or of any territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.[1]

WHEN THE MARSHAL OR HIS DEPUTY IS A PARTY IN A CAUSE.— *Sec.* 922. When the marshal or his deputy is a party in any cause, the writs and precepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.

SEIZURES FOR FORFEITURE IN CERTAIN CASES.—*Sec.* 923. When any vessel, goods, wares or merchandise are seized by any officer of the customs, and prosecuted for forfeiture by virtue of any

[1] As to suits by poor persons without paying costs, see act of July 20, 1892, ch. 209, 27 Stat. L. 252, 2 Supp. R. S. 41.

law respecting the revenue, or the registering and recording, or the enrolling and licensing of vessels, the court shall cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and by posting up the same in the most public manner for the space of fourteen days, at or near the place of trial; and proclamation shall be made in such manner as the court shall direct. And if no person appears and claims such vessel, goods, wares or merchandise, and gives bond to defend the prosecution thereof, and to respond the cost in case he shall not support his claim, the court shall proceed to hear and determine the cause according to law.

ATTACHMENT IN POSTAL SUITS.—*Sec.* 924. In all cases where debts are due from defaulting or delinquent postmasters, contractors or other officers, agents or employees of the Post-Office Department, a warrant of attachment may issue against all real and personal property and legal and equitable rights belonging to such officer, agent or employee and his sureties, or either of them, in the following cases:

First.—When such officer, agent or employee and his sureties, or either of them, is a non-resident of the district where such officer, agent or employee was appointed, or has departed from such district for the purpose of permanently residing out of the same, or of defrauding the United States, or of avoiding the service of civil process.

Second.—When such officer, agent or employee and his sureties, or either of them, has conveyed away or is about to convey away his property, or any part thereof, or has removed or is about to remove the same, or any part thereof, from the district wherein it is situate, with intent to defraud the United States.

And when any such property has been removed, certified copies of the warrant may be sent to the marshal of the district into which the same has been removed, under which certified copies he may seize said property and convey it to some convenient point within the jurisdiction of the court from which the warrant originally issued. And alias warrants may be issued in

such cases upon due application, and the validity of the warrant first issued shall continue until the return day thereof.

APPLICATION FOR WARRANT.—*Sec.* 925. Application for such warrant of attachment may be made by any district or assistant district attorney, or any other person authorized by the Postmaster-General, before the judge, or, in his absence, before the clerk of any court of the United States having original jurisdiction of the cause of action. And such application shall be made upon an affidavit of the applicant, or of some other credible person, stating the existence of either of the grounds of attachment enumerated in the preceding section, and upon production of legal evidence of the debt.

ISSUING WARRANT; DUTY OF CLERK AND MARSHAL.—*Sec.* 926. Upon any such application and upon due order of any judge of the court, or, in his absence, without such order, the clerk shall issue a warrant for the attachment of all the property of any kind belonging to the person specified in the affidavit, which warrant shall be executed with all possible dispatch by the marshal, who shall take the property attached, if personal, into his custody, and hold the same subject to all interlocutory or final orders of the court.

OWNERSHIP OF ATTACHED PROPERTY; TRIAL; OTHER REMEDIES.—*Sec.* 927. At any time within twenty days before the return day of such warrant the party whose property is attached may, on giving notice to the district attorney of his intention, file a plea in abatement, traversing the allegations of the affidavit, or denying the ownership of the property attached to be in the defendants or either of them; in which case the court may, upon application of either party, order an immediate trial by jury of the issues raised by the affidavit and plea; but the parties may, by consent, waive a trial by jury, in which case the court shall decide the issues raised. And any party claiming ownership of the property attached and a specific return thereof shall be confined to the remedy herein afforded, but his right to an action of trespass, or other action for damages, shall not be impaired hereby.

PROCEEDS OF ATTACHED PROPERTY TO BE INVESTED.—*Sec.* 928. When the property attached is sold on any interlocutory order of the court, or is producing any revenue, the money arising

from such sale or revenue shall be invested in securities of the United States, under the order of the court, and all accretions shall be held subject to the orders of the same.

PUBLICATION OF ATTACHMENT.—*Sec.* 929. Immediately upon the execution of any such warrant of attachment, the marshal shall cause due publication thereof to be made, in the case of absconding debtors for two months and of non-residents for four months. The publication shall be made in some newspaper published in the district where the property is situate, and the details thereof shall be regulated by the order under which the warrant is issued.

PERSONS HAVING PROPERTY OF DEFENDANTS TO ACCOUNT FOR IT; SALES VOID; PERSONAL NOTICE.—*Sec.* 930. After the first publication of such notice of attachment as required by law, every person indebted to or having possession of any property belonging to the said defendants, or either of them, and having knowledge of said notice, shall account and answer for the amount of such debt and the value of such property; and any disposal or attempt to dispose of any such property, to the injury of the United States, shall be illegal and void. And when the person indebted to or having possession of the property of such defendants, or either of them, is known to the district attorney or marshal, such officer shall see that personal notice of the attachment is served upon such person, but the want of such notice shall not invalidate the attachment.

DISCHARGE OF ATTACHMENT; BOND.—*Sec.* 931. Upon application of the party whose property has been attached, the court, or any judge thereof, may discharge the warrant of attachment as to the property of the applicant, provided such applicant shall execute to the United States a good and sufficient penal bond, in double the value of the property attached, to be approved by a judge of the court, and with condition for the return of said property, or to answer any judgment which may be rendered by the court in the premises.

ACCRUED RIGHTS NOT TO BE ABRIDGED.—*Sec.* 932. Nothing contained in the preceding eight sections shall be construed to limit or abridge, in any manner, such rights of the United States as have accrued or been allowed in any district under the former practice of or the adoption of state laws by the United States courts.

ATTACHMENTS DISSOLVED IN CONFORMITY WITH STATE LAWS.—*Sec.* 933. An attachment of property, upon process instituted in any court of the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in the cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the laws of the state where said court is held, such attachment would be dissolved upon like process instituted in the courts of said state; *provided*, that nothing herein contained shall interfere with any priority of the United States in the payment of debts.[1]

PROPERTY TAKEN UNDER REVENUE LAWS IRREPLEVIABLE.—*Sec.* 934. All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.[2]

GARNISHEES IN SUITS BY THE UNITED STATES ON NOTES, ETC.—*Sec.* 935. In any suit by the United States against a corporation for the recovery of money upon a bill, note or other security, the debtors of the corporation may be summoned as garnishees; and it shall be the duty of any person so summoned to appear in open court and to depose, in writing, to the amount which he was indebted to the said corporation at the time of the service of the summons and at the time of making such deposition; and judgment may be entered in favor of the United States for the sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due to the United States; *provided*, that no judgment shall be entered against any garnishee until after judgment has been rendered against the corporation defendant to the said action, or until the sum in which the garnishee stands indebted is actually due.

ISSUE TENDERED WHEN GARNISHEE DENIES INDEBTEDNESS.—*Sec.* 936. When any person summoned as garnishee deposes in open court that he is not, and was not at the time of the service of the summons, indebted to such corporation, an issue may be tendered by the United States upon such demand, and if, upon the trial of that issue, a verdict is rendered against the garnishee,

[1] See Shwartz *v.* H. B. Claflin Co., 60 Fed. Rep. 676.

[2] See Pollard *v.* Reardon, 65 Fed. Rep. 848.

judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suit.

GARNISHEE FAILING TO APPEAR.—*Sec.* 937. If any person summoned as garnishee, as aforesaid, fails to appear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court.

BAILING OF PROPERTY SEIZED UNDER CUSTOMS LAWS.—*Sec.* 938. Upon the prayer of any claimant to the court, that any vessel, goods, wares or merchandise, seized and prosecuted under any law respecting the revenue from imports or tonnage, or the registering and recording or the enrolling and licensing of vessels, or any part thereof, should be delivered to him, the court shall appoint three proper persons to appraise such property, who shall be sworn in open court, or before a commissioner appointed by the district court to administer oaths to appraisers, for the faithful discharge of their duty; and the appraisement shall be made at the expense of the party on whose prayer it is granted. If, on the return of the appraisement, the claimant, with one or more sureties, to be approved by the court, shall execute a bond to the United States for the payment of a sum equal to the sum at which the property prayed to be delivered is appraised, and produce a certificate from the collector of the district where the trial is had, and of the naval officer thereof, if any there be, that the duties on the goods, wares and merchandise, or tonnage-duty on the vessel so claimed, have been paid or secured in like manner as if the same had been legally entered, the court shall, by rule, order such vessel, goods, wares or merchandise to be delivered to such claimant; and the said bond shall be lodged with the proper officer of the court. If judgment passes in favor of the claimant, the court shall cause the said bond to be cancelled; but if judgment passes against the claimant as to the whole or any part of such vessel, goods, wares or merchandise, and the claimant does not within twenty days thereafter pay into the court, or to the proper officer thereof, the amount of the appraised value of such vessel, goods, wares or merchandise so condemned, with the costs, judgment shall be granted upon the bond, on motion in open court, without further delay.[1]

[1] See Rev. Stat. § 570. What is a valid bond release under section 938, see The Haytian Republic, 57 Fed. Rep. 508.

SALE AFTER CONDEMNATION.—*Sec.* 939. All vessels, goods, wares or merchandise which shall be condemned by virtue of any law respecting the revenue from imports or tonnage, or the registering and recording or the enrolling and licensing of vessels, and for which bonds shall not have been given by the claimant, shall be sold by the marshal or other proper officer of the court in which condemnation shall be had, to the highest bidder, at public auction, by order of such court, and at such place as the court may appoint, giving at least fifteen days' notice (except in cases of perishable merchandise) in one or more of the public newspapers of the place where such sale shall be; or if no paper is published in such place, in one or more of the papers published in the nearest place thereto; for which advertising a sum not exceeding five dollars shall be paid. And the amount of such sales, deducting all proper charges, shall be paid within ten days after such sale by the person selling the same to the clerk or other proper officer of the court directing such sale, to be by him, after deducting the charges allowed by the court, paid to the collector of the district in which such seizure or forfeiture has taken place, as hereinbefore directed.

IN CASES OF SEIZURE, BAILING OF PROPERTY IN VACATION.—*Sec.* 940. In any cause of admiralty and maritime jurisdiction, or other case of seizure, depending in any court of the United States, any judge of the said court, in vacation, shall have the same authority to order any vessel or cargo or other property to be delivered to the claimants, upon bail or bond, or to be sold when necessary, as the said court has in term time, and to appoint appraisers and exercise every other incidental power necessary to the complete execution of the authority herein granted; and the recognizance of bail or bond, under such order, may be executed before the clerk upon the party's producing the certificate of the collector of the district, of the sufficiency of the security offered; and the same proceedings shall be had in case of said order of delivery or of sale as are had in like cases when ordered in term time; *provided*, that upon every such application, either for an order of delivery or of sale, the collector and the attorney of the district shall have reasonable notice in cases of the United States, and the party or counsel in all other cases.

DELIVERY BOND IN ADMIRALTY PROCEEDINGS.—*Sec.* 941. When a warrant of arrest or other process *in rem* is issued in any cause of admiralty jurisdiction, except the cases of seizure for forfeiture under any law of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the court where the cause is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such cause. Such bond or stipulation shall be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause.[1]

SPECIAL BAIL REQUIRED IN SUITS FOR DUTIES AND PENALTIES.—*Sec.* 942. In all suits or prosecutions for the recovery of duties or pecuniary penalties prescribed by the laws of the United States, commenced in any state where, by the laws thereof, imprisonment for debt shall not have been abolished, the person against whom process is issued shall be held to special bail, subject to the rules which prevail in civil suits in which special bail is required.

WHEN DEFENDANT GIVING BAIL IN ONE DISTRICT IS COMMITTED IN ANOTHER.—*Sec.* 943. When a defendant who has procured bail to respond to the judgment in a suit in any court of the United States in any district is afterward arrested in any other district and is committed to a jail the use of which has been ceded to the United States for the custody of prisoners, the judge of the court wherein the suit in which the defendaut has so procured bail is depending shall, at the request of the bail, order that such defendant be held in said jail, in the custody of the marshal of the district in which it is. The said marshal, upon the delivery of such order, duly authenticated, shall receive such person into his custody, and thereupon be chargeable for an escape, and shall forthwith make a certificate, under his

[1] See Munks *v.* Jackson, 66 Fed. Rep. 571. The right of the vessel owner to protect himself extends to possessory actions; if he fails to exercise the right he cannot require the libellant to give security for such damages: The Poconoket, 61 Fed. Rep. 106.

hand and seal, of such commitment, and transmit the same to the court from which the order issued, and, if required, shall make and deliver to such bail or his attorney a duplicate thereof. Upon the return of said certificate, the court which made the said order, or any judge thereof, may direct that an *exoneretur* be entered upon the bail-piece, where special bail shall have been found, or otherwise discharge such bail.

DEFENDANT HELD UNTIL JUDGMENT IN THE FIRST SUIT.—*Sec.* 944. When a defendant is committed by virtue of the order provided in the preceding section, he shall, unless sooner discharged by law, be holden in jail until final judgment is rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter if such judgment is rendered against him, in order that he may be charged in execution, which may in such cases be directed to and served by the marshal in whose custody he is.

BAIL AND AFFIDAVITS MAY BE TAKEN BY COMMISSIONERS OF CIRCUIT COURTS.—*Sec.* 945. Bail and affidavits, when required or allowed in any civil cause in any circuit or district court, may be taken by a commissioner of the circuit court for the district; and such acknowledgments of bail and affidavits shall have the same effect as if taken before any judge of such courts.

CALLING OF BAIL IN KENTUCKY.—*Sec.* 946. When a bail-bond is given for the appearance of any person to answer in the district or circuit court for the district of Kentucky, the clerk of such court shall call the party at the time he is bound to appear. If the party fails, the clerk shall enter such failure on his minutes, and on said entry judgment may afterward be made of record by the court; but if the party appears, the clerk shall take another bond, with sureties similar to the first, for further appearance at the next succeeding term of the court, and if the party fails to give such other bond and surety, he shall stand committed by order of the clerk until he complies.

WHEN CLERKS MAY TAKE BAIL DE BENE ESSE.—*Sec.* 947. Recognizances of special bail may be taken *de bene esse* by the clerks of the circuit and district courts, in the absence or in case of the disability of the judges, in any action depending in either of the said courts, where special bail is demandable.

AMENDMENT OF PROCESS.—*Sec.* 948. Any circuit or district court may at any time, in its discretion and upon such terms as

it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced and the amendment will not injure the party against whom such process issues.

PRIORITY OF CASES IN WHICH A STATE IS A PARTY.—*Sec.* 949. When a state is a party, or the execution of the revenue laws of a state is enjoined or stayed, in any suit in a court of the United States, such state or the party claiming under the revenue laws of a state, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties.

NOTICE OF CASE FOR TRIAL.—*Sec.* 950. In all civil actions in the courts of the United States either party may notice the same for trial.

SUITS OF UNITED STATES AGAINST INDIVIDUALS, WHAT CREDITS ALLOWED.—*Sec.* 951. In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States or by some unavoidable accident.[1]

IN SUITS UNDER POSTAL LAWS, WHAT CREDITS ALLOWED.—*Sec.* 952. No claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster, contractor or other officer, agent or employee of the Post-Office Department, unless the same has been presented to the Sixth Auditor and by him disallowed, in whole or in part, or unless it is proved to the satisfaction of the court that the defendant is, at the time of trial, in possession of vouchers not before in his power to procure, and

[1] This section applies to a suit against one who failed to account for money received during the war as acting regimental quartermaster: U. S. *v.* Wade, 75 Fed. Rep. 261. See Alexander *v.* U. S., 15 U. S. App. 158; U. S. *v.* North Amer. Com. Co., 74 Fed. Rep. 145; U. S. *v.* Patrick, 73 *id.* 800; s. c., 36 U. S. App. 645.

that he was prevented from exhibiting to the said Auditor a claim for such credit by some unavoidable accident.[1]

BILL OF EXCEPTIONS.—*Sec.* 953. A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto.[2]

DEFECTS OF FORM; AMENDMENTS.—*Sec.* 954. No summons, writ, declaration, return, process, judgment or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.[3]

DEATH OF PARTIES.—*Sec.* 955. When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render

[1] Ware *v.* U. S., 4 Wall. 617; U. S. *v.* Roberts, 9 How. 501.

[2] In Croke *v.* Aveny, 147 U. S. 375, it is held, that where a bill of exceptions is certified by a district judge holding circuit court it is presumed that the circuit justice and circuit judge were not present at the trial unless the record clearly and affirmatively shows the contrary.

[3] The right to amend exists independently of state statutes; it may be exercised at any stage of the proceedings; it extends to verdict and judgment; it is applicable to attachment suits: Bowden *v.* Burnham, 19 U. S. App. 448. See Maddox *v.* Thorn, 23 *id.* 189. It includes authority to amend in garnishment proceedings: Booth *v.* Denike, 65 Fed. Rep. 43. See McVeigh *v.* U. S., 8 Wall. 640; Railroad, etc. *v.* Lindsay, 4 *id.* 650; Porter *v.* Foley, 21 How. 393.

judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.

WHEN ONE OF SEVERAL PLAINTIFFS OR DEFENDANTS DIES.—*Sec.* 956. If there are two or more plaintiffs or defendants in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant.

DELINQUENTS FOR PUBLIC MONEY; JUDGMENT AT RETURN TERM, UNLESS, ETC.—*Sec.* 957. When suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the treasury the sum or balance reported to be due to the United States, upon the adjustment of his account it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the treasury and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument and the defendant pleads *non est factum*, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract or

other paper specified in the affidavit. And no continuance shall be granted except as herein provided.

JUDGMENT IN SUITS UNDER POSTAL LAWS.—*Sec.* 958. In suits arising under the postal laws the court shall proceed to trial, and render judgment at the return term; but whenever service of process is not made at least twenty days before the return day of such term, the defendant is entitled to one continuance, if, on his statement, the court deems it expedient; and if he makes affidavit that he has a claim against the Post-Office Department, which has been submitted to and disallowed by the Sixth Auditor, specifying such claim in his affidavit, and that he could not be prepared for trial at such term for want of evidence, the court, if satisfied thereof, may grant a continuance until the next term.

JUDGMENT IN SUITS ON DEBENTURES.—*Sec.* 959. In all suits for the recovery of money upon debentures issued by the collectors of customs, under any act for the collection of duties, it shall be the duty of the court to grant judgment at the return term, unless the defendant, in open court, exhibits some plea, on oath, by which the court is satisfied that a continuance is necessary to the attainment of justice; in which case, and not otherwise, a continuance until the next term may be granted.

SUITS ON BONDS FOR RECOVERY OF DUTIES.—*Sec.* 960. When suit is brought on any bond for the recovery of duties due to the United States, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes oath that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district before the said return term; whereupon a continuance may be granted until the next term, and no longer, if the court is satisfied that such continuance is necessary for the attainment of justice.

JUDGMENT FOR SUM DUE IN EQUITY ON BONDS, ETC.—*Sec.* 961. In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond or other specialty, where the forfeiture, breach or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall

render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury.

JUDGMENT FOR DUTIES, ETC.—*Sec.* 962. In all suits by the United States for the recovery of duties upon imports, or of penalties for the non-payment thereof, the judgment shall recite that it is rendered for duties, and such judgment, with interest thereon, and costs, shall be payable in the coin by law receivable for duties; and the execution issued thereon shall set forth that the recovery is for duties, and shall require the marshal to satisfy the same in the coin by law receivable for duties; and in case of levy upon and sale of the property of the judgment debtor, the marshal shall refuse payment from any purchaser at such sale in any other money than that specified in the execution.[1]

INTEREST ON BONDS FOR DUTIES.—*Sec.* 963. Upon all bonds on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of six per centum a year, from the time when said bonds became due.

INTEREST ON BALANCES DUE POST OFFICE DEPARTMENT.—*Sec.* 964. In all suits for balances due to the Post Office Department, interest thereon shall be recovered from the time of the default, at the rate of six per centum a year.

INTEREST ON DEBENTURES.—*Sec.* 965. In suits upon debentures, issued by the collectors of the customs under any act for the collection of duties, interest shall be allowed, at the rate of six per centum per annum, from the time when such debenture became due and payable.

INTEREST ON JUDGMENTS.—*Sec.* 966. Interest shall be allowed on all judgments in civil causes, recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the state in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such state.[2]

[1] See Rev. Stat. § 3014.

[2] See People's Bank *v.* Ætna Ins. Co., 76 Fed. Rep. 548; Moran *v.* Hagerman, 69 *id.* 427; Perkins *v.* Fourniquet, 14 How. 328; National Bk. *v.* Mechanics' Nat. Bk., 94 U. S. 437

LIENS OF JUDGMENTS OF UNITED STATES COURTS.—*Sec.* 967. Judgments and decrees rendered in a circuit or district court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon.[1]

The act of August 1, 1888, as amended by the act of March 2, 1895,[2] provides: "That judgments and decrees rendered in a circuit or district court of the United States, within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: *Provided*, That whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed or any other thing to be done in a particular manner, or in a certain office or county, or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state.

"SEC. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

"SEC. 3. That nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any state office within the same county, or the same parish in the state of Louisiana, in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county, if the clerk of the United States court be required by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish."

[1] See Massingill *v.* Downs, 7 How. 760.

[2] Act of Aug. 1, 1888, ch. 729, 25 Stat. L. 357, 1 Supp. R. S. 602; act of March 2, 1895, ch. 180, 28 Stat. L. 814, 2 Supp. R. S. 425.

NO COSTS ON RECOVERY OF LESS THAN $500.—*Sec.* 968. When, in a circuit court, a plaintiff in an action at law originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value; or a libellant, upon his own appeal, recovers less than the sum or value of three hundred dollars, exclusive of costs, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs.[1]

COSTS IN INTERNAL REVENUE SUITS UPON INFORMATION.—*Sec.* 969. When a suit for recovery of any penalty or forfeiture accruing under any law providing internal revenue is brought upon information received from any person other than a collector, deputy collector or inspector of internal revenue, the United States shall not be subjected to any costs of suit.[2]

CLAIMANT NOT ENTITLED TO COSTS WHEN REASONABLE CAUSE OF SEIZURE.—*Sec.* 970. When, in any prosecution commenced on account of the seizure of any vessel, goods, wares or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution; *provided*, that the vessel, goods, wares or merchandise be, after judgment, forthwith returned to such claimant or his agent.[3]

DOUBLE COSTS, WHEN PLAINTIFF IS NONSUITED IN ACTION AGAINST OFFICER MAKING SEIZURE, ETC.—*Sec.* 971. If, in any suit against an officer or other person executing or aiding or assist-

[1] Poor persons may sue without paying costs and counsel may be assigned, etc., by act of July 20, 1892, ch. 209, 27 Stat. L. 252, 2 Supp. R. S. 41.

[2] See Leeds *v.* Cameron, 3 Sumn. 488; Cattle *v.* Payne, 3 Day 289; Ellis *v.* Jarvis, 3 Mas. 457; Field *v.* Schell, 4 Blatch. 435.

[3] See Gelsten *v.* Hoyt, 3 Wh. 246; The Apollon, 9 *id.* 362; Averill *v.* Smith, 17 Wall. 82; The Ship Recorder, 2 Blatch. 120.

ing in the seizure of goods, under any act providing for or regulating the collection of duties on imports or tonnage, the plaintiff is nonsuited, or judgment passed against him, the defendant shall recover double costs.

In copyright suits, costs.—*Sec.* 972. In all recoveries under the copyright laws, either for damages, forfeitures or penalties, full costs shall be allowed thereon.

Costs, infringement of patent.—*Sec.* 973. When judgment or decree is rendered for the plaintiff or complainant, in any suit at law or in equity, for the infringement of a part of a patent, in which it appears that the patentee, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor, no costs shall be recovered unless the proper disclaimer, as provided by the patent-laws, has been entered at the Patent-Office before the suit was brought.

When costs of prosecution to be paid by defendant.—*Sec.* 974. When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offence not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution.

When costs are recovered by defendant in a prosecution.—*Sec.* 975. If any informer or plaintiff on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, the court shall award to the defendant his costs, unless such informer or plaintiff is an officer of the United States specially authorized to commence such prosecution, and the court, at the trial in open court, certifies upon the record that there was reasonable cause for commencing the same; in which case no costs shall be adjudged to the defendant.

Fees of clerk, marshal, etc.; by whom payable.—*Sec.* 976. If any informer on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, such informer shall

be alone liable to the clerk, marshal and attorney for the fees of such prosecution, unless he is an officer of the United States whose duty it is to commence such prosecution, and the court certifies that there was reasonable cause for commencing the same; in which case the United States shall be responsible for such fees.

COSTS; NONJOINDER OF ACTION.—*Sec.* 977. If several actions or processes are instituted, in a court of the United States or one of the territories, against persons who might legally be joined in one action or process touching the matter in dispute, the party pursuing the same shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said several actions or processes is satisfactorily shown on motion in open court.

COSTS IN LIBELS AGAINST VESSEL AND CARGO.—*Sec.* 978. When proceedings are had before a court of the United States or of the territories, on several libels against any vessel and cargo, which might legally be joined in one libel, there shall not be allowed thereon more costs than on one libel, unless special cause for libelling the vessel and cargo separately is satisfactorily shown on motion in open court. And in proceedings on several libels or informations against any cargo, or parts of cargo, or merchandise seized as forfeited for the same cause, there shall not be allowed more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned. But allowance may be made on one libel or information for the costs incidental to several claims.

CLAIMANT'S COSTS TO BE PAID BEFORE POSSESSION, WHEN, ETC.—*Sec.* 979. When judgment is rendered in favor of the claimant of any vessel or other property seized on behalf of the United States, and libelled or informed against as forfeited under any law thereof, he shall be entitled to possession of the same when his own costs are paid.

DISTRICT ATTORNEY'S COSTS.—*Sec.* 980. When a district attorney prosecutes two or more indictments, suits or proceedings which should be joined, he shall be paid but one bill of costs for all of them.

TAXATION OF FEES OF WITNESS BEFORE A COMMISSIONER.—*Sec.*

981. In no case shall the fees of more than four witnesses be taxed against the United States, in the examination of any criminal case before a commissioner of a circuit court, unless their materiality and importance are first approved and certified to by the district attorney for the district in which the examination is had; and such taxation shall be subject to revision, as in other cases.

ATTORNEY LIABLE FOR COSTS VEXATIOUSLY INCREASED BY HIM. *Sec.* 982. If any attorney, proctor or other person admitted to conduct causes in any court of the United States, or of any territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased.

BILL OF COSTS; HOW TAXED.—*Sec.* 983. The bill of fees of the clerk, marshal and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause.[1]

BILL OF COSTS TO BE SWORN TO.—*Sec.* 984. Before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the treasury, in favor of clerks, marshals, commissioners or district attorneys, the party claiming such bill shall prove by his own oath or that of some other person having a knowledge of the facts, to be attached to such bill and filed therewith, that the services charged therein have been actually and necessarily performed, as therein stated.

EXECUTIONS TO RUN IN ALL THE DISTRICTS OF THE STATE.—*Sec.* 985. All writs of execution upon judgments or decrees obtained in a circuit or district court, in any state which is divided into two or more districts, may run and be executed in any part of such state; but shall be issued from and made returnable to the court wherein the judgment was obtained.[2]

[1] See The Liverpool Packet, 2 Spr. 37; Lyell *v.* Miller, 6 McLean 422.

[2] See Lyman *v.* Smithard, 12 Blatch. 405.

EXECUTIONS IN FAVOR OF UNITED STATES TO RUN IN EVERY STATE.—*Sec.* 986. All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one state, may run and be executed in any other state or in any territory, but shall be issued from and made returnable to the court wherein the judgment was obtained.

EXECUTION STAYED ON CONDITIONS.—*Sec.* 987. When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall of course be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void.[1]

JUDGMENT-DEBTOR; CONTINUANCE.—*Sec.* 988. In any state where judgments are liens upon the property of the defendant, and where, by the laws of such state, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States held therein shall be entitled to a stay of execution for one term.

EXECUTION AGAINST OFFICERS OF REVENUE.—*Sec.* 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him or for the recovery of any money exacted by or paid to him, and by him paid into the treasury in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judg-

[1] See Jessup *v.* U. S., 106 U. S. 150; Martinton *v.* Fairbanks, 112 *id.* 673. Petition for new trial, when filed in time, see Edmanson *v.* Best, 18 U. S. App. 288.

ment, be provided for and paid out of the proper appropriation from the treasury.[1]

IMPRISONMENT FOR DEBT.—*Sec.* 990. No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. And all modifications, conditions and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state.[2]

DISCHARGE FROM ARREST OR IMPRISONMENT.—*Sec.* 991. When any person is arrested or imprisoned in any state, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such state. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such state, and the same course of proceedings shall be adopted as may be adopted in the courts thereof. But all such proceedings shall be had before any one of the commissioners of the circuit court for the district where the defendant is so held.

PRIVILEGES OF JAIL LIMITS.—*Sec.* 992. Persons imprisoned on process issuing from any court of the United States in civil actions, as well at the suit of the United States as at the suit of any person, shall be entitled to the same privileges of the yards of the respective jails as persons confined in like cases on process from the courts of the respective states are entitled to, and under the like regulations and restrictions.[3]

GOODS TAKEN ON A FIERI FACIAS, HOW APPRAISED.—*Sec.* 993.

[1] See Hendricks *v.* Gonzalez, 35 U. S. App. 127.

[2] See Stroheim *v.* Deimel, 73 Fed. Rep. 430. This section and amended Admiralty Rule 47 are not applicable to cases involving claims for unliquidated damages, and do not affect the power of the courts, sitting in admiralty, to issue a warrant of arrest in a case of personal injuries and cruelty to a seaman: Bolden *v.* Jensen, 69 Fed. Rep. 745. The section applies only to civil cases; a fine imposed under federal criminal laws is not a "debt:" *In re* Sanborn, 52 *id.* 583.

[3] See *Ex parte* Wilson, 6 Cr. 52; U. S. *v.* Knight, 14 Pet. 314.

When it is required by the laws of any state that goods taken in execution on a writ of *fieri facias* shall be appraised before the sale thereof, the appraisers appointed under the authority of the state may appraise goods taken in execution on a *fieri facias* issued out of any court of the United States, in the same manner as if such writ had issued out of a court of such state. And the marshal in whose custody such goods may be shall summon the appraisers, in the same manner as the sheriff is, by the laws of such state, required to summon them; and if the appraisers, being duly summoned, fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement. When such appraisers attend they shall be entitled to the like fees as in cases of appraisements under the laws of the state.

DEATH OF MARSHAL AFTER LEVY OR SALE.—*Sec.* 994. When a marshal dies or is removed from office, or the term of his commission expires, after he has taken in execution, under process from a court of the United States, any lands, tenements or hereditaments, and before sale or other final disposition thereof, the like process shall issue to the succeeding marshal, and the same proceeding shall be had as if such marshal had not died or been removed or the term of his commission had not expired. And when a marshal dies or is removed from office, or the term of his commission expires, after he has sold any lands, tenements or hereditaments, under process from a court of the United States, and before a deed for the same is executed by him to the purchaser, such court may, on application by the purchaser, or by the plaintiff at whose suit the sale was made, setting forth the case and the reason why the title was not perfected by said marshal, order the marshal for the time being to perfect the title and execute a deed to the purchaser upon his paying the purchase-money and costs remaining unpaid.[1]

MONEYS PAID INTO COURT.—*Sec.* 995. All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer or a designated depository of the United States, in the name and to the credit of such court; *provided*, that nothing herein shall

[1] See Doolittle *v.* Bryan, 14 How. 563.

be construed to prevent the delivery of any such money upon security according to agreement of parties, under the direction of the court.[1]

MONEYS DEPOSITED, HOW WITHDRAWN.—*Sec.* 996. No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn.

[1] The depositaries are exempt from the process of the litigants in all respects as if the money had remained in the personal custody of the officials of the court: Jones *v.* Merch. Nat. Bk., 76 Fed. Rep. 683.

CHAPTER XXIV.

PROVISIONS OF THE STATUTES COMMON TO MORE THAN ONE COURT OR JUDGE.

Exclusive Jurisdiction of Courts of the United States.

§ 530. The exclusive jurisdiction of the courts of the United States in certain cases and proceedings is established by the following provisions:

EXCLUSIVE JURISDICTION OF COURTS OF UNITED STATES.—*Sec.* 711. The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

First. Of all crimes and offenses cognizable under the authority of the United States.[1]

[1] We have already considered he subject of the jurisdiction of the district and circuit courts in criminal causes. See *ante*, ch. XXII. We may here observe, however, that under the provisions of paragraph 1 of this section a state court cannot entertain an indictment for perjury committed in a proceeding before a United States commissioner on a preliminary examination of a party on the charge of having violated a penal law of the United States: Ross *v.* State of Georgia, 55 Ga. 192; *Ex parte* Dock Bridges, 2 Woods 428. See also State *v.* Kirkpatrick, 32 Ark. 117. And it may be said generally that a state court can take no cognizance of a crime against the laws of the United States: Martin *v.* Hunter, 1 Wh. 304; State *v.* Adams, 4 Black 146; State *v.* McBride, Rice 400; Commonwealth *v.* Feely, 1 Va. Cas. 321; Huber *v.* Reiley, 53 Penn. 112; State *v.* Pike, 15 N. H. 83. See *In re* Loney, 134 U. S. 372; *In re* Green, *Ibid.* 377. A state is not deprived of jurisdiction over one who violates its law, because he follows up that offence by another against the laws of the United States: Cross *v.* North Carolina, 132 *id.* 131.

We have noticed that a party may be amenable for infractions of both state and national statutes, and liable to prosecution for the same offence in either or both courts. See *ante*, §§ 139–142. The exclusion applies only to state courts and not to preliminary proceedings before a magistrate: *In re* Iasigi, 79 Fed. Rep. 751.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.[1]

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States on land or on waters not within admiralty and maritime jurisdiction.[2]

Fifth. Of all cases arising under the patent-right or copyright laws of the United States.[3]

[1] The state courts not only have no jurisdiction of offences against the laws of the United States, but they cannot entertain a civil suit brought by the government of the United States or any person in its behalf for a forfeiture or penalty incurred under the laws of the United States, as this provision gives the federal courts exclusive jurisdiction of such causes: Hanley *v.* Sharp, 1 Dana 442; Jackson *v.* Rose, 2 Va. Cas. 34; United States *v.* Lathrop, 17 Johns. 4. But it has been held that a state court could entertain jurisdiction of a suit brought by a person for a penalty to which he was entitled by an act of Congress: Blitz *v.* Columbia Nat. Bk., 87 Penn. 87; Ordway *v.* Central Nat. Bk., 47 Md. 217. But see Missouri River Tel. Co. *v.* First Nat. Bk., 74 Ill. 217; Ely *v.* Peck, 7 Conn. 239.

[2] A collector who has the proceeds arising from the condemnation of a vessel for a violation of the revenue laws may be sued in a state court by a party who is entitled to a portion thereof as informer, notwithstanding this provision: Lapham *v.* Almy, 95 Mass. 301. And if he seizes a vessel for a violation of the revenue law and neglects to proceed for a condemnation of it within the time prescribed by law, he may be sued in a state court for an unlawful seizure: Stoughton *v.* Mott, 13 Vt. 175.

[3] Under this provision the jurisdiction of the federal courts is exclusive in all cases arising under the patent-right or copyright laws of the United States. But this exclusive jurisdiction is limited to those cases arising under the laws of the United States, such as controversies about infringements or between parties claiming the same exclusive right under different patents, and the like: Brown *v.* Shannon, 20 How. 56; Day *v.* Woodward, *Ibid.* 208; Burr *v.* Duryee, 1 Wall. 531; O'Riley *v.* Morse, 15 How. 112; Batlien *v.* Taggart, 17 *id.* 83; Goodyear *v.* Providence Rub. Co., 2 Fish. Pat. Cas. 499. But if the matter in dispute rests upon a contract between the parties even in relation to a patent-right or copyright, as on an assignment of it or a use in it, or the suit is to compel the specific performance of a contract for the transfer of an interest in a patent-right or copyright, or in any other case based upon a contract, which shows the right of the parties relating to it, and there is no question raised about the validity of the patent or infringements of it, the state courts may take cognizance of the suit: Hartzel *v.* Tilghman, 99 U. S. 547; Wilson *v.* Sanford, 10 How. 99;

Sixth. Of all matters and proceedings in bankruptcy.[1]

Seventh. Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.[2]

OATH OF UNITED STATES JUDGES.—*Sec. 712.* The justices of the Supreme Court, the circuit judges and the district judges, hereafter appointed, shall take the following oath before they proceed to perform the duties of their respective offices: "I, ——— ———, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: so help me God."

JUDGES PROHIBITED FROM PRACTICING LAW.—*Sec. 713.* It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law.

Hartshorn *v.* Day, 19 How. 211; Goodyear *v.* The Union Rubber Co., 4 Blatch. 63; Burr *v.* Gregory, 2 Paine C. C. 426; Bourcicault *v.* Hart, 13 Blatch. 47; Palte *v.* Derby, 5 McLean 328; Bourcicault *v.* Fox, 5 Blatch. 97. See also *ante*, § 161.

[1] The Bankrupt Act of 1867 was repealed by the act of June 7, 1878, which took effect Sept 1, 1878, except as to matters then pending in court: Act 45 Cong., Stat. L. 19. As to exclusive jurisdiction in matters of bankruptcy and effect of repeal of bankrupt act on state insolvent law, etc., see Sargent *v.* Helton, 115 U. S. 348; Tua *v.* Carriere, 117 *id.* 201; Graham *v.* Boston, etc., R. Co., 118 *id.* 161; Winchester *v.* Heiskell, 119 *id.* 450; s. c., 120 *id.* 273; Brown *v.* Smart, 145 *id.* 454.

Questions of interest as to the statute of limitations to suits by assignees in bankruptcy are passed upon in Pearsall *v.* Smith, 149 U. S. 231. As to illegal preference discharging an endorser of a note, see Streeter *v.* Jefferson Co. Nat. Bk., 147 *id* 36. As to discharge of husband on his liability to his wife for her paraphernal property in Louisiana, see Fleitas *v.* Richardson (No. 2), *Ibid.* 550. And as to relieving a bankrupt from obligations to third parties, touching property he purchases from his assignee, to which he himself held the legal title at the time of the assignment, see Roby *v.* Colehour, 146 *id.* 153; and this is not a federal question: *Ibid.*

[2] Sec. 711 was amended by the act of February 18, 1875, by striking out the eighth paragraph, which read as follows: "Of all suits against ambassadors or other public ministers, or their domestics or domestic servants, or against consuls or vice-consuls."

And any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor.

JUDGES RESIGNING ENTITLED, IN CERTAIN CASES, TO SALARY FOR LIFE.—*Sec.* 714. When any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

CRIERS OF THE COURTS, ATTENDANTS ON JURIES.—*Sec.* 715. The circuit and district courts may appoint criers for their courts, to be allowed the sum of two dollars per day, and the marshals may appoint such a number of persons, not exceeding five, as the judges of their respective courts may determine, to attend upon the grand and other juries, and for other necessary purposes, who shall be allowed for their services the sum of two dollars per day, to be paid by and included in the accounts of the marshal, out of any money of the United States in his hands. Such compensation shall be paid only for actual attendance, and when both courts are in session at the same time, only for attendance on one court. By the act of March 2, 1895,[1] it is enacted that all persons employed under Revised Statutes, section 715, "shall be deemed to be in actual attendance when they attend upon the order of the courts; and, *provided further*, that no such person shall be employed during vacation."

POWER TO ISSUE WRITS.—*Sec.* 716. The Supreme Court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.[2]

[1] Act of March 2, 1895, ch. 189, par. 14, 28 Stat. L. 910, etc., 2 Supp. R. S. 432.

[2] We have already considered the power of federal courts to grant writs of prohibition, mandamus and *habeas corpus*. See *ante*, ch. XIX, XX, XXI.

The powers granted in this section are given to the circuit court of appeals: Act of March 3, 1891, § 12. And to the judges of the U. S. Court in Indian Territory by act of March 1, 1895, ch. 145, § 2, 2 Supp. R. S. 393. District courts have power under this section to issue writs of *ne exeat*: Lewis *v.* Shainwald, 48 Fed. Rep. 492.

WRITS OF NE EXEAT.—*Sec.* 717. Writs of *ne exeat* may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any circuit justice or circuit judge in cases where they might be granted by the circuit court of which he is a judge. But no writ of *ne*

Scire facias is a judicial writ to enforce the execution of a judgment, and founded upon some matter of record in the cause in which it issues; and it should state the facts on which it is founded. It is in the nature of a declaration, to which the defendant may properly plead or answer: Winder *v.* Caldwell, 14 How. 434; Bently *v.* Sevier, Hemp. 250; *Ex parte* Wood, 9 Wh. 603; Wayman *v.* Southard, 10 *id.* 1; Beers *v.* Haughton, 9 Pet. 329; Insley *v.* U. S., 150 U. S. 512; Brown *v.* Wygant, 163 *id.* 618; Hunt *v.* U. S., 19 U. S. App. 683. *Capias ad satisfaciendum:* see U. S. *v.* Arnold, 69 Fed. Rep. 987.

The phrase "usages and principles of the law" has been interpreted as not limiting the power of the court to issue writs to the principles and usages of the common law, but as extending in such cases to the principles and usages of law as recognized in the state courts at the time of its enactment: Riggs *v.* Johnson, 6 Wall. 166; Bank *v.* Halstead, 10 Wh. 51.

WRITS OF CERTIORARI. — The power to issue "all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," embraces the power to issue the writ of *certiorari; Ex parte* Van Orden, 5 Blatch. 303; Russell *v.* Thomas, 31 Leg. Int. 189.

The writ of *certiorari* can only be issued as auxiliary to the exercise of judicial authority over the case or subject-matter to which it is applicable: *Ex parte* Van Arnam, 3 Blatch. 166. But a circuit court cannot issue the writ to remove a cause from the district court before a final judgment is there pronounced: Patterson *v.* United States, 2 Wh. 221. It may be used in the Supreme Court only as an ancillary process to enable that court to obtain further information in respect to some matter already before it for adjudication: United States *v.* Young, 94 U. S. 258; s. c., 12 Ct. Cl. 129. But it cannot be used to bring up a record of the proceedings that have taken place in the inferior court since an appeal: United States *v.* Adams, 9 Wall. 661.

The Supreme Court cannot issue the writ to revise the proceedings of a military commission: *Ex parte* Vallandigham, 1 Wall. 243; or to remove a cause in an inferior court because it has no jurisdiction over it: Fowler *v.* Lindsey, 3 Dall. 411; or to compel the inferior court to make a finding of facts which has been omitted: United States *v.* Adams, 9 Wall. 661; or to compel the clerk of an inferior court to append to the transcript his certificate that the transcript contains the whole record: Hodges *v.* Vaugh, 19 Wall. 12; or to correct any omissions that may have been made in the circuit court in framing a bill of exceptions: Stimpson *v.* Westchester R. Co., 3 How. 553; or to bring up the proceedings in the Court of Claims, after a new trial has been granted therein: United States *v.* Young, 94 U. S. 258; Collie *v.* United States, 12 Ct. Cl. 129. But it

exeat can be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.[1]

TEMPORARY RESTRAINING ORDERS.—*Sec.* 718. Whenever notice

will issue from the Supreme Court to the Court of Claims, directing it to make return as to the existence or non-existence of some particular and material fact: United States *v.* Adams, 9 Wall. 661; United States *v.* Gomez, 1 *id.* 690; The Rio Grande, 19 *id.* 178; and it may be issued to bring up a citation which was not transmitted to the Supreme Court with a writ of error: Field *v.* Milton, 3 Cr. 514; Innerarity *v.* Byrne, 5 How. 295; or to supply an omission of a paper from a bill of exceptions and which is referred to therein: Morgan *v.* Curtenius, 19 *id.* 8; or to compel evidence which has been omitted from a transcript to be certified: Holmes *v.* Trout, 7 Pet. 171.

A return to a writ of *certiorari* is sufficient if made by the clerk and not by the judge: Stewart *v.* Ingle, 9 Wh. 526; but it should be made under his hand and the seal of the court: Fenemore *v.* United States, 3 Dall 360.

See, in general, American Construction Co. *v.* Jacksonville T. & K. W. R. Co., 148 U. S. 372; Columbus Watch Co. *v.* Robbins, *Ibid.* 266; *In re* Schneider, *Ibid.* 162.

SUPERSEDEAS.—The provision of this section also authorizes the use of the writ of *supersedeas*, where it is necessary to the exercise of the proper jurisdiction of the court: French *v.* Shoemaker, 12 Wall. 86; Slaughter-house Cases, 10 *id.* 273; Green *v.* Buskirk, 3 *id.* 448. But the Supreme Court cannot issue a writ of *supersedeas* to stay proceedings on the judgment of an inferior court upon the ground that a writ of error is pending, unless the writ was sued out within the time prescribed by law after the entry of the judgment: Adams *v.* Law, 16 How. 144; Saltmarsh *v.* Tuthill, 12 *id.* 387; Hogan *v.* Ross, 11 *id.* 294; Wallen *v.* Williams, 7 Cr. 278.

The form of the writ must depend upon the particular circumstances of the case: Goddard *v.* Ordway, 94 U. S. 672.

OTHER WRITS.—Under the provisions of the statute under consideration writs of injunction, subpœna, subpœna *duces tecum*, attachment, assistance, inhibition and execution, may be issued from the Supreme Court, or district or circuit courts, where it may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law: Fisk *v.* Union Pac. R. Co., 10 Blatch. 518; United States *v.* Williams, 4 Cr. 372; *In re* Shephard, 3 Fed. Rep. 12; Ferrell *v.* Allison, 21 Wall. 289; Penhallow *v.* Doane, 3 Dall. 54; Wyman *v.* Southard, 10 Wh. 1; Bank *v.* Halstead, *Ibid.* 51.

[1] The foundation of the claim must be an equitable debt or pecuniary claim, and be certain or capable of being reduced to a certainty: Graham *v.* Stucken, 4 Blatch. 50; Gernon *v.* Boecaline, 2 Wash. 130. And it is not sufficient that the defendant is about to leave the district, but it must appear that he intends to leave the United States: Union Insurance Co. *v.* Kellogg, 5 W. N. 477; Patterson *v.* McLaughlin, 1 Cr. C. C. 352. See in general, Griswold *v.* Hazard, 141 U. S. 260.

is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.[1]

INJUNCTIONS.—*Sec.* 719. Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a circuit court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. And an injunction shall not be issued by a district judge, as one of the judges of the circuit court, in any case where a party has had a reasonable time to apply to the circuit court for the writ; nor shall any injunction so issued by a district judge continue longer than to the circuit court next ensuing, unless so ordered by the circuit court.[2]

[1] An injunction should not be granted without a reasonable notice, either by the court or a judge: New York *v.* Connecticut, 4 Dall. 1; Mowrey *v.* Indianapolis & C. R. Co., 4 Biss. 78. And what is a reasonable notice will depend upon the circumstances of the case. If, however, a party voluntarily appears to the application for an injunction without objection, it is a waiver of proof of notice: Marsh *v.* Bennett, 5 McLean 117; Bradley *v.* Reed, 12 Pitts. L. J. 65. But see Yungling *v.* Johnson, 1 Hughes 607.

[2] A justice of the Supreme Court may hear an application for an injunction in case of the absence or disability of the circuit and district judges: Searle *v.* Railroad, 2 Woods; and where they are all absent from the district and circuit it may be allowed by a justice allotted to another circuit: United States *v.* Canal Co., 4 Dill. 600.

The circuit court, when held by a district judge, has authority to issue the writ in all respects the same as though held by a circuit judge; but a district judge cannot in vacation allow the writ when the circuit court can be applied to: Goodyear *v.* Folsom, 3 Fed. Rep. 509; 26 I. R. R. 251. And if issued by him it ceases to be in force at the succeeding term of the circuit court unless an order is then made for its continuance: Parker *v.* Judges, 12 Wh. 561; Gray *v.* Railroad, 1 Wool. 63.

In an injunction suit the jurisdic-

INJUNCTION TO STAY PROCEEDINGS IN STATE COURTS.—*Sec.* 720. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.[1]

tional amount is not determined by that which the complainant might recover in an action at law for the acts complained of, but by the value of the right to be protected or the extent of the injury to be prevented by the injunction: Nashville, C. & St. L. R. Co. *v.* McConnell, 82 Fed. Rep. 65.

[1] See § 5106. As the bankrupt law has been repealed by the act of Jan. 7, 1878, ch. 160, 20 Stat. L. 99, 1 Supp. R. S. 170, it will be unnecessary to refer to the decisions bearing upon the exceptions contained in this section, as that is virtually obsolete.

The restraint of the federal courts in such cases is not confined to the "writ of injunction" in its technical sense, but the statute is an inhibition against staying proceedings in the state courts, either by the writ of injunction, mandamus or prohibition, or in any other manner: Fisk *v.* Union Pac. R. Co., 6 Blatch. 362. The term "proceedings" in the statute covers all proceedings in the state court or by its officers under its process; hence, if a sheriff has possession of property under process issued from a state court, it cannot be displaced by a writ issued from a federal court: Watson *v.* Jones, 13 Wall. 679; United States *v.* Collins, 4 Blatch. 142; Evans *v.* Pack, 7 Cent. L. J. 409; Ruggles *v* Simonton, 3 Biss. 325; Amer. Assn. *v.* Hurst, 16 U. S. App. 325. See also under § 720, Baker *v.* Ault, 78 Fed. Rep. 394; Southern Bank & Trust Co. *v.* Folsom, 75 *id.* 929; Trust Co. *v.* Cincinnati, 73 *id.* 716; Fenwick Hall Co. *v.* Old Saybrook, 66 *id.* 389; Amer. Assn. *v.* Hurst, 59 *id.* 1; Chic. Trust & Sav. Bk. *v.* Bentz, *Ibid.* 645; Reinach *v.* Atlantic & G. W. R. Co., 58 *id.* 33; Garner *v.* Second Nat. Bk., 67 *id.* 833.

Nor can a circuit court enjoin proceedings removed from a state to a circuit court: Fisk *v.* Union Pac. R. Co., 6 Blatch. 362; Diggs *v.* Walcott, 4 Cr. 179.

Nor can the Supreme Court enjoin proceedings in a subordinate state court, although it has allowed a writ of error to the judgment of the appellate court: Slaughter-house Cases, 10 Wall. 273. Nor can a federal court interfere with property that is in the possession of a receiver appointed by a state court: Mercantile Trust Co. *v.* Railroad Co., 16 Blatch. 324. But if after the removal of a cause from the state court into the circuit court the plaintiff brings an action in the state court to recover on a judgment rendered in the cause before the removal, an injunction will be issued from the circuit court to restrain such suit: French *v.* Hay, 22 Wall. 250; Lanning *v.* Osborne, 79 Fed. Rep. 657.

Where the U. S. courts have concurrent jurisdiction with state courts, they cannot enjoin a suit first begun in the state court; but where such suit is first brought in the U. S. court, it may enjoin the bringing of a similar suit in the state court: Tex. & Pac. R Co. *v.* Kuteman, 13 U. S. App. 99; President, etc., of Bowdoin College *v.*

LAWS OF THE STATES; RULES OF DECISION.—*Sec.* 721. The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.[1]

Merritt, 59 Fed. Rep. 6. The prohibition extends to injunctions against the court's officers and parties and litigants in the court: Gaines's Admr. *v.* Wilder, 13 U. S. App. 180.

In proceedings under Rev. Stat. § 4282, to limit liability of ship owner, a court of admiralty may enjoin suits against such ship owner: *In re* Whitelaw, 71 Fed. Rep. 733.

The United States courts have complete jurisdiction of property taken into possession by them, and no subsequent proceedings of the state courts will affect the action of the United States courts as to it: Leadville Coal Co. *v.* McCreery, 141 U. S. 475. See Lawrence *v.* Nelson, 143 *id.* 215, as to jurisdiction in equity over assets of an estate in certain cases notwithstanding state laws.

No injunction can be issued by U. S. courts against officers of a state to restrain or control the use of property already in the possession of the state, or money in its treasury when the suit is commenced; or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party. And the same rule applies to officers of the United States: Belknap *v.* Schild, 161 U. S. 10.

There is no jurisdiction to entertain a bill for injunction as to payment of a tax after it is paid: Singer, etc., *v.* Wright, 141 *id.* 696; *Ibid.* 547.

[1] RULES OF DECISIONS.—The state laws do not confer jurisdiction on the federal courts, but furnish rules of decisions in trials at common law; Orleans *v.* Phœbus, 11 Pet. 175; United States *v.* Reid, 12 How. 361; Golden *v.* Prince, 3 Wash. 313; United States *v.* Dunham, 21 L. R. 591.

CONSTRUCTION BY THE STATE COURTS.—In the construction of the statutes and laws of a state, the general principle is that the judicial department of the state is the appropriate organ for this purpose, and that decisions of the highest court of a state construing the statutes thereof are binding upon the federal courts, although the federal courts may have previously put a different construction upon them; but this doctrine does not apply where these come in conflict with the Constitution, laws, or treaties of the United States: State *v.* Grand Trunk R. Co., 3 Fed. Rep. 887; Supervisors *v.* United States, 18 Wall. 71; United States *v.* Morrison, 4 Pet. 124; Van Rensselaer *v.* Kearney, 11 How. 297; Coates *v.* Muse, 1 Brock. 529; Richmond *v.* Smith, 15 Wall. 429; Walker *v.* Commissioners, 17 *id.* 648; Webster *v.* Cooper, 14 How. 488; Elmondorf *v.* Taylor, 10 Wh. 152; United States *v.* Knight, 14 Pet. 301.

WHERE THE DOCTRINE APPLIES.—The construction of the statute of limitations of a state, by the highest court of a state, will be followed by the federal courts: Henderson *v.* Griffin, 5 Pet. 151; Shelby *v.* Guy, 11 Wh. 361; Bell *v.* Morrison, 1 Pet. 351; Baker *v.* Jackson, 1 Paine 559; Bauserman *v.* Blunt, 147 U. S. 647; Balkam *v.* Woodstock Iron Co., 154

id. 177; Fearing *v.* Glenn, 73 Fed. Rep. 116. And the construction by the state courts of statutes in relation to the validity of voluntary assignments to creditors will be followed: Lloyd *v.* Fulton, 91 U. S. 479; South Branch Lumber Co. *v.* Ott, 142 *id.* 622; also in relation to fraudulent conveyances: Allen *v.* Massey, 17 Wall. 351; Brashear *v.* West, 7 Pet. 608; Sumner *v.* Hicks, 2 Black 532; also relating to executors: United States *v.* Morrison, 4 Pet. 124; also affecting the title to real property: Williams *v.* Kirkland, 13 Wall. 306; Nichols *v.* Levy, 5 *id.* 433; Van Rensselaer *v.* Kearney, 11 How. 297; Barber *v.* Pittsburg, F. W. & C. R. Co., 166 U. S. 83; also relating to the power of a corporation under a statute to issue bonds: Thomas *v.* Scotland, 2 Dill. 7; and generally in construing the charters of municipal corporations: Goodrich *v.* Chicago, 4 Biss. 18; Stone *v.* Wisconsin, 94 U. S. 181; and construing the constitution of the state, as where the state court decides that a statute is void unless it appears on the legislative journals, as provided by the Constitution: South Ottawa *v.* Perkins, 94 U. S. 260; Taylor *v.* Secor, 92 *id.* 575; Kimbal *v.* Mobile, 3 Woods 555; Leavenworth *v.* Barnes, 94 U. S. 70; Boyd *v.* Alabama, *Ibid.* 645. So the decision of the highest state court construing a statute relating to the assessment or collection of taxes is binding upon the federal courts: Paine *v.* Wright, 6 McLean 395; Woodman *v.* Latimer, 2 Fed. Rep. 842. So a construction given by the highest state court to the statute of frauds of the state will be followed; and the construction by such state courts of statutes relating to the solemnization of marriages: Meister *v.* Moore, 96 U. S. 76; and as to the right of a corporation to condemn land: Secomb *v.* Railroad Co., 23 Wall. 108; and as to the character and extent of the jurisdiction of state tribunals: Williamson *v.* Berry, 8 How. 495; Jetter *v.* Hewitt, 22 *id.* 352.

The section does not apply to proceedings to condemn land for public purposes: Carlisle *v.* Cooper, 26 U. S. App. 240.

WHERE THE STATE DECISIONS WILL NOT BE FOLLOWED. — The federal courts are not bound to follow the decisions of inferior state courts: Patapsco Guano Co. *v.* Morrison, 2 Woods 395; Von Brocklen *v.* Brooklyn City R. Co., 5 Blatch. 379. The construction of the state constitution and laws by the highest state court is accepted by the Supreme Court of the United States, unless they conflict with some provision of the federal constitution or a statute or rule of general commercial law: Louisville, etc., R. Co. *v.* Mississippi, 133 U. S. 587; Gormley *v.* Clark, 134 *id.* 338; Union Bk. *v.* Kansas Bk., 136 *id.* 223; Norton *v.* Shelby Co., 118 *id.* 425; Bucher *v.* Cheshire, etc., R. Co., 125 *id.* 555; Amy *v.* Watertown, 130 *id.* 301; *In re* Duncan, 139 *id.* 449; Leeper *v.* Texas, *Ibid.* 462; Cross *v.* Allan, 141 *id.* 528; McIlvaine *v.* Brush, 142 *id.* 155; Miller *v.* Ammon, 145 *id.* 421; Pickett *v.* Foster, 149 *id.* 505; Aberdeen Bank *v.* Chehalis County, 166 *id.* 440; Rhodes *v.* U. S. Nat. Bk., 24 U. S. App. 607. A mortgage held invalid by the highest court of a state must be held invalid in the federal courts: Smith, etc., Co. *v.* McGroarty, 136 U. S. 237; see Peters *v.* Bain, 133 *id.* 670; and as to chattel mortgages, see Etheridge *v.* Sperry, 139 *id.* 266; as to failure to comply with tax laws by a resident of a state, see Palmer *v.* McMahon, 133 *id.* 660; as to recoveries against municipal corporations, see Detroit

The act of June 1, 1874,[1] provides: That when an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in

v. Osborne, 135 *id.* 492; and as to weight of state decisions on validity of municipal bonds issued on the authority of state laws, see Rich *v.* Mentz, 139 *id.* 632.

In case of an appeal from a judgment of a Supreme Court of a territory, which was admitted as a state after the appeal was taken, a subsequent judgment of the highest court of the state upon the construction of a territorial law involved in the appeal is entitled to be followed by the Supreme Court, in preference to its construction by the Supreme Court of the territory: Stutsman Co. *v.* Wallace 142 U. S. 293; Capital Bank *v.* School District, No. 26, 27 U. S. App. 479. If the decision of the highest state court, construing a state constitution, differs from a previous construction, the federal courts will not follow the last decision where rights have been acquired under former ones: Fairfield *v.* Gallatin, 100 U. S. 47; Douglas *v.* Pike, 101 *id.* 677; Roberts *v.* Bolles, 101 *id.* 119; Pacific Rolling Mill Co. *v.* James St. Const. Co., 29 U. S. App. 698.

LAWS OF THE SEVERAL STATES.—The language of the section, "laws of the several states" does not limit the application of the provision to laws enacted by the legislative authority of the state only, but it embraces long-established local customs having the force of laws: Swift *v.* Tyson, 16 Pet. 1. But the decisions of the state courts on questions of a general nature, and not based upon a statute of the state or long-established custom or usage, are not within the provision, and therefore not conclusive authority: Hough *v.* Railway Co., 100 U. S. 213; Olcott *v.* Supervisors, 16 Wall. 678; Boyce *v.* Tabb, 18 *id.* 546. Thus the decisions of the state courts of highest authority upon the general principles of the commercial law are not binding upon the federal courts: Oats *v.* National Bk., 100 U. S. 239; Swift *v.* Tyson, 16 Pet 1; Williams *v.* Suffolk Ins. Co., 3 Sum. 270; 13 Pet. 415; Jewett *v.* Hone, 1 Woods 530; Austin *v.* Miller, 5 McLean 153; 13 How. 218; Wood *v.* Lutzinger, 2 Fed. Rep. 285.

The federal courts have maintained the integrity of commercial paper, and as far as was possible protected the interests of parties thereto from the unjust and frequently fluctuating decisions of the state courts. Thus the Supreme Court of the United States has frequently held that if a contract when made is valid by the laws of the state at the time, as construed by the court of highest authority in the state, and a subsequent decision of such court would invalidate such contract, such decision is not binding upon the federal courts: Gelpcke *v.* Dubuque, 1 Wall. 175; Havermeyer *v.* Iowa County, 2 *id.* 204; Thompson *v.* Lee County, 3 *id.* 327; Mitchell *v.* Burlington, 4 *id.* 270; Chicago *v.* Sheldon, 9 *id.* 50; Lee *v.* Rogers, 8 *id.* 181; City *v.* Lamson, 9 *id.* 477; Olcott *v.* Supervisors, 16 *id.* 678; Ohio Trust Co. *v.* Debolt, 16 How. 416; Pine Grove *v.* Talcott, 19 Wall. 666; Louisville, etc., Co. *v.* Gaines, 12 C. L. N. 407.

[1] Act of June 1, 1874, ch. 200, 18 Stat. L. 50.

the federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the state or territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were so made.

PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS.—*Sec. 722.* The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this title, and of title "CIVIL RIGHTS," and of title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

WHEN SUITS IN EQUITY MAY BE MAINTAINED.—*Sec. 723.* Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.[1]

[1] WHERE THERE IS A PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW.—This section merely declares a common principle in relation to equity jurisdiction. We have already considered the equity jurisdiction of federal courts: *ante*, chs. x., xiii. But we will here note the substance of some of the decisions bearing upon this section. The language, "plain, adequate and complete remedy . . . at law," it has been held, refers to the common law and not to the statutes of the states: Gordon *v.* Hobart, 2 Sum. 401; Dodge *v.* Woolsey, 18 How. 331; Cropper *v.* Coburn, 2 Curt. 465; Kimball *v.* Mobile, 3 Woods 555. It refers to the remedies which existed when the Judiciary Act of September 24, 1789, was passed, with such changes as Congress has made: N. Brit. and Merc. Ins. Co. *v.* Lathrop, 25 U. S. App. 443. One purpose of the section is to preserve the right to trial by jury: Grether *v.* Wright, 75 Fed. Rep. 742. To prevent the jurisdiction of the federal courts in equity there must be a

Sec. 724. In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances w ere they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and, if a defendant fails to comply with such order,

speedy, practical and efficient remedy at law, without the aid of a court of equity: Wright *v.* Ellison, 1 Wall. 16; Grand Chute *v.* Winegar, 15 *id.* 373; Hungerford *v.* Sigerson, 20 How. 156; Boyce *v.* Grundy, 3 Pet. 210; Watson *v.* Sutherland, 5 Wall. 74; Oelrichs *v.* Spain, 15 *id.* 211; Morgan *v.* Beloit, 7 *id.* 613; May *v.* Leclare, 11 *id.* 217.

Equity jurisdiction may be invoked although there is also a remedy at law unless the remedy at law both in respect of the final relief and the mode of obtaining it, is as efficient as the remedy which equity could confer under the same circumstances: Kilbourn *v.* Sunderland, 130 U. S. 505. And also to establish a lost deed, even though the proof of the loss might be made in an action at law: Simmons, etc., Co. *v.* Doran, 142 *id.* 417. As to allowing amendments where a party is mistaken as to his rights to meet the real equities of the case, see Wiggins Ferry Co. *v.* Ohio and M. R. Co., *Ibid.* 396. As to appointment of receivers in an equity suit, their duties respecting property in their hands, their relation to the court, etc., see Quincy, etc., R. Co. *v.* Humphreys, 145 *id.* 82; Texas and Pac. R. Co. *v.* Cox, *Ibid.* 593.

A sale of property decreed by a court of equity should not be set aside for trifling reasons, and the courts should look closely into the reasons assigned before setting aside the sale: Pewabic Min. Co. *v.* Mason, 145 U. S. 349. A contract creditor without a judgment at law has no standing in a United States circuit court sitting as a court of equity upon a bill to set aside and vacate a fraudulent conveyance: Cates *v.* Allen, 149 *id.* 451; Swan Land Co. *v.* Frank, 148 *id.* 603.

A railroad corporation can not, by the general principles of equity jurisprudence, or by the provisions of the code of Washington Territory, maintain a suit for an injunction, as for a nuisance, against the keepers of saloons near the line of its road, at which its workmen buy intoxicating liquors and get so drunk as to be unfit for work: Nor. Pac. R. Co. *v.* Whalen, 149 *id.* 157.

If the remedy at law can only be made available by a multiplicity of actions, a bill may be filed in equity: Garrison *v.* Memphis Ins. Co., 19 How. 312; Craine *v.* McCoy, 1 Bond 422; Plummer *v.* Connecticut Mutual Ins. Co., 1 Holmes 267. For cases of equitable jurisdiction where not sufficient remedy at law under Rev. Stat. § 723, see Tyler *v.* Savage, 143 U. S. 79; Wehrman *v.* Conklin, 155 *id.* 314; Indianapolis Water Co. *v.* Amer. Strawboard Co., 53 Fed. Rep. 970.

the court may, on motion, give judgment against him by default.[1]

The act of June 22, 1874,[2] provides: That in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever, in his belief, any business book, invoice or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such

[1] NOTICE AND MOTION TO PRODUCE.—A motion with notice to the opposite party of the time and place of hearing, and a plain designation or description of the papers or documents, the production and examination of which is desired, is sufficient: Jacques *v.* Collins, 2 Blatch 23; United States *v.* Three Tons, 6 Biss. 379. The notice is a mere preliminary proceeding to enable the party to bring before the court the motion for the order to produce the paper or document, and at the time fixed for the making of the motion the defendant has a right to be heard, and he is not bound to produce them until the court shall order him so to do, and is in no default unless he neglects or refuses to obey the order: Thompson *v.* Selden, 20 How. 194; Maye *v.* Carberry, 2 Cr. C. C. 336; Bas *v.* Steele, 3 Wash. 381; Macomber *v.* Clarke, 3 Cr. C. C. 347.

The order will not be granted unless it be shown that the paper or document exists and is in the possession of the other party, and that it is material as evidence and pertinent to the issue: Iasigi *v.* Brown, 1 Curt. 401; Triplett *v.* Bank, 3 Cr. C. C. 646; Jacques *v.* Collins, 2 Blatch. 23. The opposite party may show that the document is not in his possession and prevent the issuance of the order: Bas *v.* Steele, *supra*; United States *v.* 28 Packages, Gilp. 306.

The notice and motion should be in writing, and the notice may be served upon the opposite party or his attorney: Geyger *v.* Geyger, 2 Dall. 332; United States *v.* 469 Barrels, 10 I. R. R. 205.

The order can only be to produce the books, papers or documents on the trial, and the party seeking them has no right to examine them before that time: Triplett *v.* Bank, 3 Cr. C. C. 646; but it has been held that the court may grant an order for inspection before the trial with leave to copy: Lucker *v.* Phœnix Assur. Co., 67 Fed. Rep. 18; Exchange Nat. Bk. *v.* Washita Cattle Co., 61 *id.* 190; nor can he require the production of a paper that would subject the opposite party to forfeiture; United States *v.* 28 Packages, Gilp. 306; or which would incriminate him: U. S. *v.* Nat. Lead Co., 75 Fed. Rep. 94; Kirkpatrick *v.* Pope Mfg. Co., 61 *id.* 46.

THE ORDER MUST BE SERVED.—The order for the production of the paper or document should be served on the party a reasonable time before the time fixed for its production: Macomber *v.* Clarke, 3 Cr. C. C. 347. The penalty for refusal is a nonsuit, or default, as the circumstances of the case may require: Iasigi *v.* Brown, 1 Curt. 401.

[2] Act of June 22, 1874, ch. 391, § 5, 18 Stat. L. 186.

book, invoice or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid.[1]

POWER TO IMPOSE OATHS AND PUNISH CONTEMPTS.—*Sec.* 725. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; *provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said courts.[2]

[1] For a full review of this statute, touching the production of books and papers, see Boyd *v.* U. S., 116 U. S. 626; cited and applied in Counselman *v.* Hitchcock, 142 *id.* 547.

[2] THE POWER TO PUNISH FOR CONTEMPTS.—The power to punish for contempts is incidental to all courts, as this is necessary to the other powers granted to a court: United States

v. Hudson, 9 Cr. 32; *Ex parte* Robinson, 19 Wall. 506. This section defines the powers of the U. S. courts to punish for contempt: *In re* Buskirk, 25 U. S. App. 613.

The use of abusive language in the court room is a contempt of court: United States *v.* Emerson, 4 Cr. C. C. 188. It is also a contempt of court for a person who has been acquitted of a crime to threaten vengeance on a witness against him in the presence of the court: United States *v.* Carter, 3 Cr. C. C. 423; or for a person to commit an assault and battery in the hall of entrance to the room where the court is held: United States *v.* Emerson, 4 Cr. C. C. 188.

So it is a contempt of court for a person who is summoned as a juror in a criminal case to express an opinion after the summons, for the purpose of disqualifying himself from serving as a juror: United States *v.* Devaughan, 3 Cr. C. C. 84; or for a juror to escape out of a jury-room through a window, against the commands of the bailiff: Orfutt *v.* Parrott, 1 Cr. C. C. 154; or for a juror to disobey the order of the court, not to converse with any one about the case: *In re* May, 1 Fed. Rep. 737.

Witnesses may be guilty of contempt.—A witness who refuses to be sworn according to law is guilty of contempt of court: United States *v.* Coolidge, 2 Gallis 364; or refuses to answer questions: United States *v.* Caton, 1 Cr. C. C. 150; or to obey the requirements of a summons or subpœna: Voss *v.* Luke, 1 *id.* 331; United States *v.* Williams, 4 *id.* 372; *Ex parte* Pleasants, *Ibid.* 314.

If the witness shows no disposition to treat the process of the court with contempt, but is unable by reason of sickness to comply with the process; or is detained by the dangerous illness of a member of his family, or by age, infirmity, or by any other cause which renders his absence from home oppressive or dangerous to his health, the court will not compel his attendance or punish him for a contempt: *Ex parte* Beebes, 2 Wall. Jr. 127. Inducing a witness by bribery to remain away is a contempt: *In re* Brule, 71 Fed. Rep. 943.

Officers may be guilty of contempt.—An officer of the court may be guilty of contempt in disobeying an order to pay money received by him in his official capacity: Bagley *v.* Yates, 3 McLean 465; *In re* Pitman, 1 Curt. 186; United States *v.* Mann, 2 Brock. 1. An attorney is an officer of the court, in contemplation of law, and if he collects money for his client which he refuses to pay over to him, he is liable to an attachment for a contempt. But if he has cross-demands against his client, and has not acted dishonestly in not paying over the money, he is not guilty of contempt and not properly liable to an attachment: *In re* Paschal, 10 Wall. 483.

Punishment of the party.—There are two classes of cases in which punishment for contempt of court can be properly administered: (1) Where the guilty party has by some past act shown contempt for the court; and (2) Where he continues his contempt by refusing to comply with its orders. In the former case the court will determine the amount of the punishment from the nature and gravity of the case; in the latter case the party refusing to obey the order of the court should be fined and imprisoned until he performs the act required of him by the order of the court, or shows that it is not in his power to do so: *In re* Chiles, 22 Wall. 157.

The statute limits the punishment to fine and imprisonment, hence an

NEW TRIALS.—*Sec.* 726.—All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have been usually granted in the courts of law.[1]

POWER TO HOLD TO SECURITY OF THE PEACE..—*Sec.* 727. The judges of the Supreme Court and of the circuit and district courts, the commissioners of the circuit courts, and the judges and other magistrates of the several states who are or may be authorized by law to make arrests for offences against the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognizable before them.

POWER TO ENFORCE AWARDS OF CONSULS.—*Sec.* 728. The district and circuit courts and the commissioners of the circuit courts shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice-consul or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice-consul or commercial agent to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge; application for the exercise of such power being first made to such court or commissioner by petition of such consul, vice-consul or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration or decree is complied with, or the parties are otherwise discharged therefrom by the consent in writing of

attorney cannot be disbarred for contempt, although he may for misconduct: *Ex parte* Robinson, 19 Wall. 506.

[1] These motions are addressed to the discretion of the court in which made and are not reviewable in an appellate court: Terre Haute *v.* Struble, 109 U. S. 381.

such consul, vice-consul or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice-consul or commercial agent; *provided, however,* that the expenses of the said imprisonment and maintenance of the prisoners, and the costs of the proceedings, shall be borne by such foreign government, or by its consul, vice-consul or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process, and do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners.

OFFENCES PUNISHABLE WITH DEATH; WHERE TRIED.—*Sec.* 729. The trial of offences punishable with death shall be had in the county where the offence was committed, where that can be done without great inconvenience.[1]

[1] The statutes providing for the places where crimes and offences are to be prosecuted in the different states are as follows:

In *Arkansas*, Act of Feb. 20, 1897, ch. 269, 29 Stat. L. 590, 2 Supp. R. S. 558.

In *Georgia*, Act of Jan. 29, 1880, ch. 17, 21 Stat. L. 63; Act of Feb. 15, 1889, ch. 168, 25 Stat. L. 671, 1 Supp. R. S. 643.

In *Idaho*, Act of July 25, 1892, ch. 145, 27 Stat. L. 72, 2 Supp. R. S. 28.

In *Indian Territory*, Act of March 1, 1895, ch. 145, 28 Stat. L. 693, 2 Supp. R. S. 392.

In *Iowa*, Act of July 20, 1882, ch. 312, 22 Stat. L. 172, 1 Supp. R. S. 358; Act of Feb. 24, 1891, ch. 282, 26 Stat L. 767, 1 Supp. R. S. 895.

In *Kansas*, Act of May 3, 1892, ch. 59, 27 Stat. L. 24, 2 Supp. R. S. 12.

In *Louisiana*, Act of Aug. 13, 1888, ch. 869, 25 Stat. L. 438, 1 Supp. R. S. 615; Act of Aug. 8, 1888, ch. 789, 25 Stat. L. 388, 1 Supp. R. S. 606.

In *Michigan*, Act of June 19, 1878, ch. 326, 20 Stat. L. 175; Act of April 30, 1894, ch 66, 28 Stat. L. 67, 2 Supp. R. S. 181.

In *Minnesota*, Act of July 12, 1894, ch. 132, 28 Stat L. 102, 2 Supp. R. S. 195.

In *Mississippi*, Act of July 18, 1894, ch. 144, 28 Stat. L. 114, 2 Supp. R. S. 202.

In *Missouri*, Act of Jan. 21, 1879, ch. 20, 20 Stat. L. 263; Act of Jan. 28, 1897, ch. 106, 29 Stat. L. 502, 2 Supp. R. S. 544.

In *Montana*, Act of July 20, 1892, ch. 208, 27 Stat. L. 252, 2 Supp. R. S. 40.

In *North Carolina*, Act of Aug. 9, 1894, ch. 244, 28 Stat. L. 274, 2 Supp. R. S. 234.

In *North Dakota*, Act of April 26, 1890, ch. 161, 26 Stat. L. 67, 1 Supp. R. S. 716.

In *Ohio*, Act of June 8, 1878, ch. 169, 20 Stat. L. 102; Act of Feb. 4, 1880, ch. 18, 21 Stat. L. 64.

In *South Dakota*, Act of Nov. 3, 1893, ch. 10, 28 Stat. L. 5, 2 Supp. R. S. 151.

In *Tennessee*, Act of June 11, 1880, ch. 203, 21 Stat. L. 176.

In *Texas*, Act of June 14, 1880, ch. 213, 21 Stat. L. 198; Act of June 3, 1884, ch. 64, 23 Stat. L. 35, 1 Supp. R. S. 438; Act of March 1, 1889, ch.

OFFENCES ON THE HIGH SEAS; WHERE TRIABLE.—*Sec.* 730. The trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought.[1]

OFFENCES BEGUN IN ONE DISTRICT AND COMPLETED IN ANOTHER.—*Sec.* 731. When any offence against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein.[2]

SUITS FOR PECUNIARY PENALTIES AND FORFEITURES.—*Sec.* 732. All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found.

SUITS FOR INTERNAL REVENUE TAXES; WHERE BROUGHT.—*Sec.* 733. Taxes accruing under any law providing internal revenue

333, § 18, 25 Stat. L. 783, 1 Supp. R. S. 674; Act of June 11, 1896, ch. 422, 29 Stat. L. 456, 2 Supp. R. S. 527; Act of Feb. 28, 1897, ch. 178, 29 Stat. L. 516, 2 Supp. R. S. 547. See Cook *v.* U. S., 138 U. S. 157.

In *Utah*, Act of March 2, 1897, ch. 366, 29 Stat. L. 620, 2 Supp. R. S. 576.

In *Washington*, Act of Feb. 5, 1890, ch. 65, 26 Stat. L. 45, 1 Supp. R. S. 711.

[1] This section relates to crimes within the maritime jurisdiction of the court: United States *v.* Alberty, 1 Hemp. 444. If the offence is committed upon the high seas, and the offender comes in the ship into one district, yet he may be tried in another district if he is first apprehended there: United States *v.* Thompson, 1 Sum. 168; United States *v.* Corrie, 23 Law Rep. 145. But if the vessel on which the offence was committed was bound to a port in this district, and the accused is in custody in the same district, this is evidence that the offender was apprehended in that district: United States *v.* Mingo, 2 Curt. 1; United States *v.* Magill, 1 Wash. 463; 4 Dall. 425. See also United States *v.* Bird, 1 Sprague 299; United States *v.* Baker, 5 Blatch. 6; United States *v.* Arwo, 19 Wall. 486.

[2] Authorities contend that the indictment at common law should state that the deceased died in the county in which the indictment is found, though the better opinion is that it is not necessary: Am. Cr. Law (Wharton), 4th and revised edition, § 1052 *et seq.* The question of jurisdiction was raised in the famous Guiteau trial under the count in the indictment alleging stroke in District of Columbia and death in New Jersey, and it was held that the court had jurisdiction: See Assassination of Garfield, by Alexander & Easton, p. 1794 *et seq.*, 1835 *et seq.*, and 2569 *et seq.*

may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides.

SEIZURES; WHERE COGNIZABLE. — *Sec.* 734. Proceedings on seizures for forfeiture under any law of the United States made on the high seas may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

CAPTURES OF INSURRECTIONARY PROPERTY. — *Sec.* 735, as amended by the act of February 18, 1875.[1] Proceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting or promoting any insurrection against the government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted

PROCEEDINGS TO ENJOIN COMPTROLLER OF THE CURRENCY.— *Sec.* 736. All proceeedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

WHEN A PART OF SEVERAL DEFENDANTS CANNOT BE SERVED.— *Sec.* 737. When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as afore-

[1] Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 318.

said, shall not constitute matter of abatement or objection to the suit.[1]

SUITS IN EQUITY AGAINST ABSENT DEFENDANTS—*Sec.* 738, as

[1] This section excludes state legislation inconsistent with it: Allnut *v.* Lancaster, 76 Fed. Rep. 131. Under the provisions of this section any of the parties to a joint contract may be sued without joining the others who are citizens of another state: Clearwater *v.* Meridith, 21 How. 489; Doremus *v.* Bennet, 4 McLean 224; Noyes *v.* Barnard, 15 U. S. App. 527; and if there are several executors an action may be maintained against one although the others may not be found in the district: United States *v.* Backus, 6 McLean 443; and if a creditor has instituted a suit against partners, some of whom are non-residents of the district, he may discontinue the suit as to the non-residents and continue it as to the others: Inbusch *v.* Farwell, 1 Black 566; and the voluntary appearance of a defendant in such a case, over whom the court has no jurisdiction, would not defeat it: Taylor *v.* Cook, 2 McLean 516.

PARTIES TO A BILL.—There are three classes of parties to a bill: 1. The formal parties. 2. Persons having an interest in the controversy and who ought generally to be made parties in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice by adjusting all the rights involved in it. If, however, their interests are separable from those of other parties before the court, so that the court can proceed to a decree and do complete and final justice without affecting the interests of those not before the court, the latter are not indispensable. 3. Persons who have not only an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience: Shields *v.* Barrow, 17 How. 130. In the latter case the court cannot, under the provisions of this section, proceed to a decree in the absence of parties whose rights must necessarily be affected by it: Mallow *v.* Hinde, 12 Wh. 193; Northern Ind. R. Co. *v.* Michigan Cent. R. Co., 15 How. 233; Ribon *v.* Railroad Co., 16 Wall. 446; Williams *v.* Bankhead, 19 *id.* 563.

WHO ARE NECESSARY PARTIES.—If a person claims an interest in the fund in controversy, and is in possession of the property given to secure the payment thereof, he is a necessary party and must be before the court in the adjudication of the matter: Williams *v.* Bankhead, 19 Wall. 563; and if the bill seeks to hold a surety liable, the principal is also a necessary party: Robertson *v.* Carson, 19 Wall. 94. If the bill is to set aside a sale made between parties, the vendor is a necessary party: Coiron *v.* Millaudon, 19 How. 113; and if partners bring an action for a debt due the firm, all the partners are necessary parties: Parsons *v.* Howard, 2 Woods 1. So if a bill is filed by a stockholder to obtain his rights, where his stock has been fraudulently transferred on the books of the corporation, the corporation is a necessary party to the suit: Kendig *v.* Dean, 97 U. S. 433. And a corporation is an indispensable party to a bill filed by

amended by the act of March 3, 1875.[1] That when in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title, to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be;[2] or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state; *provided, however,* that any defendant or defendants not actually

a receiver to have its assets applied to the payment of a debt: Brigham *v.* Luddington, 12 Blatch. 237.

[1] Act of March 3, 1875, ch. 137, § 8, 18 Stat. L. 472. See Amer. Freehold Land Mort. Co. *v.* Thomas, 30 U. S. App. 690; Compton *v.* Wabash R. Co., 31 *id.* 486; Tug River Coal & Salt Co. *v.* Brigel, *Ibid.* 665.

[2] If it appears in the bill itself that the defendants are absent or non-resident, an order under this section may be issued without issuing a subpœna or fixing a time for appearance: U. S. *v.* American Lumber Co., 80 Fed. Rep 309.

personally notified as above provided, may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.[1]

SUIT BROUGHT WHERE DEFENDANTS RESIDE OR ARE FOUND.—*Sec.* 739. Except in the cases provided in the next three sections, no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and except in the said cases and the cases provided by the preceding section, no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant or in which he is found at the time of serving the writ.[2]

[1] The proper practice under this provision was pointed out by Judge Dillon, in Bronson *v.* Keokuk, 2 Dill. 498. The bill in such case should aver the citizenship and residence of the respective defendants, and subpœnas should be issued against all of them If the marshal return some of them not found, and they do not appear, the court, on the showing of these and other necessary facts, should make an order for them to appear and plead by a certain day, and direct the mode of serving the same. Personal service must be made in all cases where the residence of the absent defendant is known or can be ascertained, and resort can be had to constructive notice by publication only where the better mode is not possible or not practicable within a reasonable time and by the exercise of reasonable diligence. The order directing an absent defendant to appear cannot be made until the return day of the writ, for he has until that day to appear voluntarily; and whether a personal service is practicable or not may be shown by the complainant or his attorney or agent most conversant with the facts. If it appears that the defendant resides in another district, service may be directed to be made by the marshal of that district, and perhaps the court may make a special order directing or authorizing service by some other officer.

A claim of a given number of shares of stock in a corporation, but which are not designated, is not property within the meaning of this section, but a mere chose in action.

A debtor may be made a party by an order of publication, if the bill is by a creditor to reach assets of a debtor and have them applied to the payment of his debt. But if they are citizens of the same state an order will not be granted: Bingham *v.* Luddington, 12 Blatch. 237.

[2] See act of March 3, 1875, ch. 137, § 1, 18 Stat. L. 470. For the statutes providing for the places where suits

SUITS NOT OF A LOCAL NATURE.—*Sec.* 740. When a state contains more than one district, every suit not of a local nature, in the circuit or district courts thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the state, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall endorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same state.[1]

SUITS OF A LOCAL NATURE IN STATES CONTAINING SEVERAL DISTRICTS.—*Sec.* 741. In suits of a local nature, where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides.

WHEN LAND LIES IN DIFFERENT DISTRICTS.—*Sec.* 742. Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the circuit or district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted.

WHERE ACTIONS MAY BE COMMENCED IN INDIANA.—*Sec.* 743. In the district of Indiana all actions of which the circuit and district courts have jurisdiction may be instituted in said courts, respectively, held at New Albany and Evansville, in the first

are to be brought in the different states, see *ante*, note to Rev. Stat. 729, where the statutes prescribing where crimes and offences are to be prosecuted are set forth.

[1] This section has not been repealed by the acts of 1875 and 1877–8: Goddard *v.* Mailler, 80 Fed. Rep. 422.

instance, by filing the proper pleadings or other papers in the offices of the deputy clerks performing the duties of clerks of said courts respectively; and all proper and lawful process shall issue therefrom in the same manner as from other circuit and district courts in like cases.

WHERE SUITS MAY BE BROUGHT IN IOWA.—*Sec.* 744. In the district of Iowa all suits not of a local nature in the district court against a single defendant, inhabitant of such state, must be brought in the division of the district where he resides; but if there are two or more defendants, residing in different divisions of the district, such suits may be brought in either division, and duplicate writs may be sent to the other defendants. The clerk issuing the duplicate writ shall endorse thereon that it is a true copy of a writ sued out of the court in the proper division of the district; and the original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded in as one suit. All issues of fact in such suits shall be tried at a term of the court held in the division where the suit is so brought.

WHERE SUITS MAY BE BROUGHT IN KENTUCKY.—*Sec.* 745. In the district of Kentucky the clerks of the circuit and district courts, respectively, upon issuing original process in a civil action, shall make it returnable to the court nearest to the county of the residence of the defendant, or of that defendant whose county is nearest a court, if he have information sufficient, and shall immediately, upon payment by the plaintiff of his fees accrued, send the papers filed to the clerk of the court to which the process is made returnable; and whenever the process is not thus made returnable, any defendant may, upon motion, on or before the calling of the cause, have it transferred to the court to which it should have been sent had the clerk known the residence of the defendant when the action was brought.

CAUSES IN PROGRESS OF TRIAL, NEW TERM.—*Sec.* 746. When the trial or hearing of any cause, civil or criminal, in a circuit or district court, has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; and the court may proceed therein and bring it to a conclusion,

in the same manner and with the same effect as if another stated term of the court had not intervened.

PARTIES MAY MANAGE THEIR CAUSES PERSONALLY.—*Sec.* 747. In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.[1]

OFFICERS FORBIDDEN TO PRACTICE AS ATTORNEYS.—*Sec.* 748. No clerk, assistant or deputy clerk, of any territorial, district or circuit court, or of the Court of Claims, or the Supreme Court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney or counsel in any cause depending in either of said courts, or in any district for which he is acting as such officer.[2]

PENALTY FOR VIOLATING THE PRECEDING SECTION.—*Sec.* 749. Whosoever violates the preceding section shall be stricken from the roll of attorneys by the court upon complaint, upon which the respondent shall have due notice, and be heard in his defence; and in the case of a marshal or deputy marshal so acting, he shall be recommended by the court for dismissal from office.

FINAL RECORD IN EQUITY AND ADMIRALTY.—*Sec.* 750. In equity and admiralty causes, only the process, pleadings and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record.[3]

[1] Under the act of Feb. 15, 1879, ch. 81, 1 Supp. R. S. 217, women may be admitted to practice in the Supreme Court.

[2] No clerk, assistant or deputy of district or circuit courts shall be appointed receiver or master, unless special reasons exist therefor: Act of March 3, 1879, ch. 183, par. 2, 1 Supp. R. S. 254.

[3] See § 698. So far as this section requires the proof to be reduced to writing, where the facts are to be reviewed on appeal, it is applicable to the circuit courts of appeals: The Philadelphian, 21 U. S. App. 90. As to duty of clerk in making up the record, see Nashua & Lowell R. Corp. *v.* Boston & Lowell R. Corp., *Ibid.* 50.

CHAPTER XXV.

PROVISIONS OF THE STATUTES RELATING TO JURIES.

Jurors, Qualification, Selection, and the Constitution of Juries.

§ 531. The Revised Statutes, with the amendments thereof, provide for the qualification and selection of grand and petit jurors, and the constitution of juries, as follows:

JURORS, QUALIFICATIONS AND MODE OF SELECTION.—*Sec.* 800. Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot or otherwise, according to the mode of forming such juries then practiced in such state court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and empanelling of juries, in substance, to the laws and usages relating to jurors in the state courts, from time to time in force in such state.[1]

The act of March 1, 1875, provides: That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for

[1] See § 1671.

the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.[1]

[1] The act of March 1, 1875, ch. 114, § 4, 18 Stat. L. 336, provides that no citizen possessing other qualifications shall be disqualified as a juror in the federal or state courts on account of race, color or previous condition of servitude.

The act of June 20, 1879, ch. 52, § 2, 21 Stat. L. 43, amends this section by providing how jurors shall be drawn, and that persons shall not be disqualified on account of race, color or previous condition of servitude.

The provisions of this last act are not merely directory, but mandatory; United States *v.* Ambrose, 5 C. L. B. 360; 3 Fed. Rep. 283.

Qualification of jurors.—The word "qualification" in this section refers to general qualifications, such as age or citizenship, or anything else relating to his personal standing, but not to such matters as would render a juror unfit from acting in some particular case: United States *v.* Collins, 1 Woods 499; United States *v.* Williams, 1 Dill. 485.

The federal courts have no discretion in reference to jurors, as the law requires that they shall have like qualifications and be entitled to like exemptions as jurors in the highest courts of law of the state, under the laws of the state: United States *v.* Wilson, 6 McLean 604; United States *v.* Gardiner, 5 C. L. N. 501.

The state laws relating to challenges to jurors are in force under this provision; United States *v.* Reed, 2 Blatch. 435; United States *v.* Tuska, 14 *id.* 5. But if an act of Congress expressly provides for peremptory challenges in particular cases, no state law can affect this right: United States *v.* Shackelford, 18 How. 288. Nor does this section affect the right to a peremptory challenge, as it is not based upon the qualification of the juror, or upon the right to exemption: United States *v.* Douglass, 2 Blatch. 207; United States *v.* Devlin, 6 *id.* 71. Nor does the section refer to the number of which the panel shall consist: United States *v.* Insurgents, 2 Dall. 335; United States *v.* Collins, 1 Woods 499. And the jurors should be selected from the district at large: United States *v.* Woodruff, 4 McLean 105. The right to peremptory challenges is now regulated by statute. See Rev. Stat. § 819, *post.*

Mode of drawing jurors.—The mode of obtaining a jury is now provided for by the act of June 20, 1879. Under the former provisions of the statute relating thereto it was held that a literal conformity to the mode of selecting and drawing jurors prescribed by the laws of a state is not required, unless it is adopted by a rule of the federal court, and substantial conformity only is necessary: United States *v.* Tallman, 10 Blatch. 21; Alston *v.* Manning, 1 Chase 460.

In these matters the federal courts may exercise a discretion as to the best mode of securing the main object of the law, which is to secure jurors properly qualified, and selected and empanelled substantially according to the mode required to be pursued by the laws of the state: United States *v.* Collins, 1 Woods 499; United States *v.* Wilson, 6 McLean 604; United States *v.* Gardner, 5 C. L. N. 501; United States *v.* Tallman, 10 Blatch. 21.

The act of June 30, 1879,[1] provides: That the per diem pay of each juror, grand or petit, in any court of the United States shall be two dollars; and that the last clause of section 800 of the Revised Statutes of the United States, which refers to the state of Pennsylvania, and sections 801, 820 and 821 of the Revised Statutes of the United States are hereby repealed; and that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons possessing the qualifications prescribed in section 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein. But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the state authorities in selecting jurors in the highest courts of the state; and no person shall serve as a petit juror more than one term in any one year, and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith; *provided*, that no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in

The jurors need not be taken from the lists made by the state authorities. Conformity with the state laws is required in two respects only: 1. In reference to the qualification and exemption of jurors. 2. In reference to the mode of designating and empanelling jurors, as by ballot, lot or otherwise; which mode must conform to that in substance pursued by the state courts: United States *v.* Gardner, 5 C. L. N. 501; United States *v.* Collins, 1 Woods 499. But this act has no application to the selecting of jurors for the territorial courts, as they are not courts of the United States within the meaning of this section: Clinton *v.* Englebrecht, 13 Wall. 434. See also American Ins. Co. *v.* Canton, 1 Pet. 546; Benner *v.* Porter, 9 How. 235.

[1] Act of June 30, 1879, ch. 52, § 2, 21 Stat. L. 43.

any court of the United States on account of race, color or previous condition of servitude.

By the act of August 8, 1888,[1] section 2 of the act of June 30, 1879, is amended so that whenever any circuit or district court of the United States shall be held at the same time and place they shall be authorized and required, if the business of the courts will permit, to use interchangeably the juries in either court drawn according to the provisions of said act.

Sec. 801. Repealed.

JURORS, HOW APPORTIONED IN DISTRICTS.—*Sec.* 802. Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense or unduly to burden the citizens of any part of the district with such services.

VENIRE; HOW ISSUED AND SERVED.—*Sec.* 803. Writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ.

TALESMEN FOR PETIT JURIES.—*Sec.* 804. When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section.

SPECIAL JURIES IN CIRCUIT COURTS.—*Sec.* 805. When special juries are ordered in any circuit court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states.

JURIES IN PARTICULAR DISTRICTS.—Sections 806, 807, 814, 815, 816, 817 and 818 relate to juries in particular districts.[2]

[1] Act of August 8, 1888, ch. 785, 25 Stat. L. 386, 1 Supp. R. S. 605.

[2] The acts relating to jurors in particular districts are as follows:

NUMBER OF GRAND JURORS; COMPLETING THE JURY.—*Sec.* 808. Every grand jury empanelled before any district or circuit court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the by-standers, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.[1]

APPOINTMENT AND POWERS OF THE FOREMAN OF GRAND JURY.—*Sec.* 809. From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power

In *Arkansas*, Rev. Stat. § 814.

In *Colorado*. Act of April 20, 1880, ch. 58, 21 Stat. L. 76.

In *District of Columbia*, Act of March 3, 1893, ch. 208, par. 20, 27 Stat. L. 572, 2 Supp R. S. 124.

In *Georgia*, Act of Jan. 29, 1880, ch. 17, 21 Stat. L. 63.

In *Kentucky and Indiana*, Rev. Stat. § 815.

In *Indian Territory*, Act of March 1, 1889, ch. 333, 25 Stat. L. 783, 1 Supp. R. S. 672; Act of March 1, 1895, ch. 145, 28 Stat. L. 693, 2 Supp. R. S. 396.

In *Michigan*, Act of June 19, 1878, ch. 326, 20 Stat. L. 175, 1 Supp. R. S. 199; Act of April 30, 1894, ch. 66, 28 Stat. L. 67, 2 Supp. R. S. 182.

In *Mississippi*, Act of July 18, 1894, ch. 144, 28 Stat. L. 114, 2 Supp. R. S. 203.

In *New York*, Rev. Stat. § 806; Act of March 23, 1882, 22 Stat. L. 32, 1 Supp. R. S. 334.

In *North Carolina*, Rev. Stat. § 816.

In *Ohio*, Act of June 8, 1878, ch. 169, 20 Stat. L. 102; Act of Feb. 4, 1880, ch. 18, 21 Stat. L. 64.

In *Oklahoma*, Act of May 2, 1890, ch. 182, 26 Stat. L. 81, 1 Supp. R. S. 732.

In *South Carolina*, Rev. Stat. § 817.

In *South Dakota*, Act of Nov. 3, 1893, ch. 10, 28 Stat. L. 5, 2 Supp. R. S. 152.

In *Tennessee*, Act of June 11, 1880, ch. 203, 21 Stat. L. 176.

In *Utah*, Act of June 23, 1874, ch. 469, 18 Stat. L. 253, 1 Supp. R. S. 49; Act of March 22, 1882, ch. 47, 22 Stat. L. 30, 1 Supp. R. S. 332; Act of July 16, 1894, ch. 138, 28 Stat. L. 107, 2 Supp. R. S. 200.

In *Vermont*, Rev. Stat. §§ 807, 818.

[1] Notwithstanding the provision of this section, the federal courts have power to determine what number of persons shall be summoned in order that a grand jury may be selected or constituted therefrom: United States *v.* Tuska, 14 Blatch. 5.

This section applies only to the district and circuit courts, and does not embrace territorial courts: Reynolds *v.* United States, 98 U. S. 145.

to administer oaths and affirmations to witnesses appearing before the grand jury.

GRAND JURIES; WHEN SUMMONED.—*Sec.* 810. No grand jury shall be summoned to attend any circuit or district court unless one of the judges of such circuit court, or the judge of such district, in his own discretion, or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. And either of the said courts may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offence, or the time during which a person so accused may be held under recognizance before indictment found.[1]

DISCHARGE OF GRAND JURIES.—*Sec.* 811. The circuit and district courts, the district courts of the territories, and the Supreme Court of the District of Columbia, may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary.

JURORS NOT TO BE SUMMONED OFTENER THAN ONCE IN TWO YEARS.—*Sec.* 812. No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge.[2]

GRAND JURORS MAY ACT IN CASES COGNIZABLE IN CIRCUIT COURTS.—*Sec.* 813. The grand jury empanelled and sworn in

[1] It is not necessary that the order contemplated in this section should be put on file by the judge himself, but it may be entered by the clerk with the same effect, as in contemplation of law what is done by the clerk under the authority of the judge is done by the judge himself. It is the duty of the clerk to issue a venire, under the provisions of this section, upon the order of the judge, but an omission of such order is a mere technical omission, and cannot constitute the basis of an application, addressed only to the discretion of the court: United States *v.* Reed, 2 Blatch. 435.

[2] A juror is not subject to challenge by reason of having served in another case in the same court at the same term: Walker *v.* Collins, 50 Fed. Rep. 737.

any district court may take cognizance of all crimes and offences within the jurisdiction of the circuit court for said district as well as of said district court.

Secs. 814–818. [See section 806 *supra.*]

CHALLENGES.—*Sec.* 819. When the offence charged is treason or a capital offence, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel or to individual jurors for cause or favor, shall be tried by the court without the aid of triers.[1]

GRAND AND PETIT JURORS IN CERTAIN CASES.—*Sec.* 822.[2] No person shall be a grand or petit juror in any court of the United States upon any inquiry, hearing or trial of any suit, proceeding or prosecution based upon or arising under the provisions of title "Civil Rights" and of title "Crimes," for enforcing the pro-

[1] See §§ 1031, 4303. The words "any other felony" in this section designate other offences than those that are capital, for they are otherwise specially provided for by the provisions of this section: United States *v.* Coppersmith, 22 A. L. J. 250; 4 Fed. Rep. 198. If a criminal case is removed from a state court, the number of peremptory challenges is regulated by this section and not by the state law: Georgia *v.* O'Grady, 3 Woods 496. In cases other than capital ones this section gives the defendant ten challenges in the following cases:

1. Where the offence is declared by statute expressly or impliedly to be a felony.

2. Where Congress does not define an offence, but simply punishes it by its common law name, and at common law it is a felony.

3. Where Congress adopts a state law providing what is an offence, and under such law it is a felony: United States *v.* Coppersmith, 22 A. L. J. 250; 4 Fed. Rep. 198.

One indicted for robbing a mail carrier is entitled to ten peremptory challenges: Harrison *v.* U. S., 163 U. S. 140.

The right to three peremptory challenges is not impaired by consolidation under Rev. Stat. § 921: Mut. Life Ins. Co. *v.* Hillmon, 145 U. S. 285.

[2] Sections 820 and 821 were repealed by the act of June 20, 1879, ch. 52, § 2, 21 Stat L. 43; and the act of May 13, 1884, ch. 46, 1 Supp. R. S. 428.

visions of the fourteenth amendment to the Constitution, who is, in the judgment of the court, in complicity with any combination or conspiracy in said titles set forth; and every grand and petit juror shall, before entering upon any such inquiry, hearing or trial, take and subscribe an oath, in open court, that he has never directly or indirectly counselled, advised or voluntarily aided any such combination or conspiracy.[1]

[1] The act of August 8, 1888, ch. 785, 25 Stat. L. 386, 1 Supp. R. S. 605, allows juries of circuit and district courts to be used interchangeably.

CHAPTER XXVI.

PROVISIONS OF THE REVISED STATUTES RELATING TO EVIDENCE.

Witnesses, Depositions, Subpœnas, Certificates, Authentications and Other Matters Relating to Evidence.

§ 532. The Revised Statutes, as amended, provide in reference to evidence as follows:

NO WITNESS CAN BE EXCLUDED ON ACCOUNT OF COLOR.—*Sec.* 858. In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried;[1] *provided*, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty.[2]

[1] Parties and persons interested may be witnesses in the Court of Claims: Act of March 3, 1883, ch. 116, § 6, 1 Supp. R. S. 403; Act of March 3, 1887, ch. 359, § 8, 1 *Ibid.* 561.

[2] See Steiner *v.* Eppinger, 61 Fed. Rep. 253: Mut. Ben. Life Ins. Co. *v.* Robison, 58 *id.* 723. State laws cannot restrict this section, which contains the law as to interested parties as witnesses: De Beaumont *v.* Webster, 71 *id.* 226. This section applies as well to cases in which the United States is a party as to those between private persons: Green *v.* United States, 9 Wall. 655; and as well to a party who testifies on his own behalf as to cases where one party calls another to testify: Texas *v.* Chiles, 21 *id.* 488; Railroad Co. *v.* Pollard, 22 *id.* 341. See § 1977.

But the statute does not apply to

The act of March 16, 1878,[1] provides that in the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of crimes, offences and misdemeanors, in the United States courts, territorial courts and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.[2]

territorial courts, as they are not courts of the United States: Good *v.* Martin, 95 U. S. 90. The section includes not only witnesses orally, but by deposition, who may give evidence without regard to interest or color: Cornet *v.* Williams, 20 Wall. 226.

A husband is a competent witness for a wife, and in an action by a husband and wife to recover damages for an injury to her, she is a competent witness if she is made so under the laws of the state: Green *v.* Taylor, 3 Hughes 400; Packet Co. *v.* Clough, 20 Wall. 528; *In re* Campbell, 3 Hughes 276.

At common law the reason for excluding a wife from testifying in favor of her husband did not rest upon the ground that she had an interest in the controversy, but upon grounds of public policy, and under this provision she cannot testify where she is a party to the suit, unless authorized to do so by the laws of the state: *Ibid.*; Lucas *v.* Brooks, 18 Wall. 436. A widow may not testify to a conversation between herself and her husband, when she is neither a party to nor interested in the suit: Hopkins *v.* Grimshaw, 165 U. S. 342. A husband, executor of his deceased wife, may testify to incidents occurring with third parties: Hinchman *v.* Parlin, 74 Fed. Rep. 698.

If a party dies after his evidence has been taken, the adverse party may be examined if the administrator of the deceased party insists upon using the depositions before the jury: Mumm *v.* Owens, 2 Dill. 475. See also The Pollard, 2 M. L. 16.

The section does not apply to criminal trials which are not within the words "at common law:" Logan *v.* U. S., 144 U. S. 263; U. S. *v.* Hale, 53 Fed. Rep. 352. A state law forbidding conviction on uncorroborated evidence of an accomplice should be followed by a federal court: U. S. *v.* Van Leuven, 65 Fed. Rep. 78.

A party cannot testify as to transactions with intestate; this section governs rather than state laws: Morris *v.* Morton, 75 Fed. Rep. 912. But he may testify to matters within his own knowledge, relating to such transactions, which the testator could not have known or testified to had he been alive: Steiner's Exrs. *v.* Eppinger, 23 U. S. App. 344.

[1] Act of March 16, 1878, ch. 37, 20 Stat. L. 30.

[2] Comments upon the failure of the defendant to testify must be excluded from the jury: Wilson *v.* U. S., 149 U. S. 61; see also Hicks *v.* U. S., 150 *id.* 442; Reagan *v.* U. S., 157 *id.* 301; Johnson *v.* U. S., *Ibid.* 320; Allison *v.* U. S., 160 *id.* 203.

TESTIMONY OF WITNESSES BEFORE CONGRESS; WHEN NOT ADMISSIBLE AGAINST THEM.—*Sec.* 859. No testimony given by a witness before either house or before any committee of either house of Congress shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

WHEN PLEADINGS AND DISCLOSURES OF EVIDENCE CANNOT BE USED AGAINST A PARTY.—*Sec.* 860. No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; *provided*, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.[1]

[1] Notwithstanding the provisions of this section, the books and papers of a party which have been taken from him may be given in evidence against him in a criminal prosecution for the enforcement of a penalty or forfeiture: United States *v.* Hughes, 12 Blatch. 553; 8 Ben. 29; Barnes *v.* United States, 21 I. R. R. 212; United States *v.* Myers, 1 Hughes 533. But a defendant in an action for a penalty cannot be required to produce books and papers that will subject him to a penalty: Johnson *v.* Donaldson, 3 Fed. Rep. 22. See also United States *v.* Three Tons of Coal, 6 Biss. 379.

An affidavit setting forth that certain testimony is material to the defence, that defendant is without means to pay witnesses, and praying that they be summoned and paid by United States is not a "pleading of a party" nor "discovery or evidence obtained from a party or witness by means," etc., which cannot be given in evidence against him in a criminal proceeding under section 860: Tucker *v.* U. S., 151. U. S. 164. See also Snow *v.* Mast, 63 Fed. Rep. 623.

By the act of February 11, 1893, ch. 83, 27 Stat. L. 443, 2 Supp. R. S. 80, no person is excused from testifying or producing books, etc., before the Interstate Commerce Commission on the ground that such testimony would criminate him. He is not to be prosecuted on account of the transactions testified to, but is liable to prosecution and punishment for perjury, as well as for refusal to testify. But the constitutional provision that "no person . . . shall be compelled in any criminal case to be a witness against himself," applies to proceedings before a grand jury, and a defendant is not obliged to answer questions when he states that his answers might criminate him; Counselman *v.* Hitchcock, 142 U. S. 547; and see *Ex p.* Irvine, 74 Fed. Rep. 954.

MODE OF PROOF IN COMMON-LAW ACTIONS.—*Sec.* 861. The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided.[1]

MODE OF PROOF IN EQUITY AND ADMIRALTY.—*Sec.* 862. The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided.

DEPOSITIONS DE BENE ESSE.—*Sec.* 863. The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public not being of counsel or attorney to either of the parties, nor interested in the event of the cause.[2] Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition ;[3]

[1] In an action for personal injury the court cannot compel the plaintiff to undergo a surgical examination before the trial : Union Pac. R. Co. *v.* Botsford, 141. U. S. 250.

[2] By the act of August 15, 1876, ch. 304, 19 Stat. L. 206, 1 Supp. R. S. 123, "Notaries public of the several states, territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do."

[3] Where a party attends and cross-examines a witness, he thereby waives irregularities in the notice : Mut. Ben. Life Ins. Co. *v.* Robison, 19 U. S. App. 266.

and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record, or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.[1]

[1] NECESSARY CONDITIONS FOR TAKING AND READING.—A deposition *de bene esse* can only be taken where the following conditions exist:

1. When the witness lives more than one hundred miles from the place of trial;

2. Or is bound on a voyage to sea;

3. Or is about to go out of the United States;

4. Or is about to go out of the district to a greater distance than one hundred miles from the place of trial and before the time of trial;

5. Or is ancient and infirm.

And such a deposition can only be used upon the trial where it is shown—

1. That the witness is dead;

2. Or gone out of the United States;

3. Or to a greater distance than one hundred miles from the place of trial;

4. Or that by reason of age, sickness or bodily infirmity, he is unable to appear at court.

Harris *v.* Wall, 7 How. 693; The Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; Wood *v.* Kellogg, 6 McLean 44; Bannert *v.* Day, 3 Wash. 243; Stein *v.* Bowman, 13 Pet. 209.

The authority to take depositions *de bene esse* is in derogation of the rules of the common law, and the statute on this subject is therefore strictly construed, so that depositions which have not been taken in strict accordance with the statute are inadmissible. And if depositions are taken in accordance with the prevalent practice of the state courts, which do not agree with the positive provisions of this statute and the rules of the federal courts, they are not admissible: Evans *v.* Eaton, 7 Wh. 356; Evans *v.* Hettick, 3 Wash. C. C. 408; Bell *v.* Morrison, 1 Pet. 351; Harris *v.* Wall, 7 How. 693; Allen *v.* Blunt, 2 W. & M. 121; Carrington *v.* Stimpson, 1 Curt. 437.

A defendant may examine a plaintiff *de bene esse*, before issue joined where the plaintiff resides out of the district and more than one hundred miles from the place of trial: *Ex parte* Fisk, 113 U. S. 713; Lowrey *v.* Kusworm, 66 Fed. Rep. 539.

The failure to take depositions *de bene esse*, does not destroy the party's right to recover mileage for witnesses who have traveled more than one hundred miles: Hunter *v.* Russell, 59 Fed. Rep. 964, disapproving of Smith *v.* Railroad Co., 38 *id.* 321.

Depositions may be taken in term

MODE OF TAKING DEPOSITIONS DE BENE ESSE.—*Sec.* 864. Every person deposing as provided in the preceding section shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent.[1]

TRANSMISSION TO THE COURT OF DEPOSITIONS DE BENE ESSE.—*Sec.* 865. Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause.[2]

time, even where the cause might have been tried at that term: Union Pac. R. Co. *v.* Reese, 15 U. S. App. 92.

A witness "lives," within the meaning of this section where he can be found, and is sojourning, residing or abiding for any lawful purpose. The court took judicial notice that the distance from the place of trial was over one hundred miles: Mut. Ben. Life Ins. Co. *v.* Robison, 19 U. S. App. 266.

The act of Feb. 3, 1879, ch. 40, 20 Stat. L. 278, 1 Supp. R. S. 212, provides for taking testimony, to be used before Congress, in cases of private claims against the United States. As to the taking of depositions before the Interstate Commerce Commission, see the act of Feb. 10, 1891, ch. 128, 26 Stat. L. 743, 1 Supp. R. S. 891.

[1] Depositions taken by a stenographer, not reduced to writing in the presence of the witness, nor read over to or by him, cannot be admitted in evidence against the objection of either party: Moller *v.* U. S., 13 U. S. App. 472.

[2] A state law regulating the time that must pass before a deposition can be read after it has been filed in court, does not bind the federal courts: Walker *v.* Collins, 19 U. S. App. 307. See Russell *v.* Ashley (note), Hemp. C. C. 546, and Workem *v.* Diamond, *Ibid.* 701, as to mode of taking depositions, subpœnaing witnesses, rules of court and decisions thereon under sec. 30 of the act of Sept. 24, 1789.

DEPOSITIONS UNDER DEDIMUS POTESTATEM.—*Sec.* 866. In any case where it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of sections 863, 864 and 865 shall not apply to any deposition to be taken under the authority of this section.[1] By the act of March 9, 1892,[2] it is provided that in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held.[3]

DEPOSITIONS IN PERPETUAM REI MEMORIAM.—*Sec.* 867. Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken *in perpetuam*

[1] This section, like all laws in derogation of the common law, should be strictly construed: United States *v.* Parrott, 1 McA. 447. The only mode in which a deposition can be taken in a foreign country is under a commission: Stein *v.* Bowman, 13 Pet. 209; Winthrop *v.* Union Ins. Co., 2 Wash. 7. A commission may issue in chancery suits although the witness lives within the distance of one hundred miles: Russell *v.* McLellan, 3 W. & M. 157; but a commission will not issue in a suit at law where the witness lives within that distance: Wellford *v.* Miller, 1 Cr. C. C. 485; Gustine *v.* Ringgold, 4 Cr. C. C. 191; Rhodes *v.* Selin, 4 Wash. 715.

THE COMMISSION MUST ISSUE FROM THE COURT.—This section provides that the commission may be granted by any of the courts of the United States; hence it cannot be granted by a judge at chambers: Peters *v.* Prevost, 1 Paine 64. And the commission is not grantable of course, but only upon a showing that the evidence is material: United States *v.* Parrott, 1 McA. 447; Sutton *v.* Manderville, 1 Cr. C. C. 115. And under this section depositions *in perpetuam rei memoriam* cannot be taken *ex parte* where the defendants have not been served with process, though they are out of the country: Green *v.* Compania Generale Italiana de Navigation, 82 Fed. Rep. 490.

[2] Act of March 9, 1892, ch. 14, 27 Stat. L. 7; 2 Supp. R. S. 4.

[3] This act merely provides an additional mode of taking depositions in the cases already authorized and does not confer additional rights to obtain proofs under the provisions of state statutes: Register Co. *v.* Leland, 77 Fed. Rep. 242; Shellabarger *v.* Oliver, 64 *id.* 306.

rei memoriam which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof.

SUBPŒNAS FOR TAKING TESTIMONY BY COMMISSION.—*Sec.* 868. When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or territory, the clerk of any court of the United States for such district or territory shall, on the application of either party to the suit, or of his agent, issue a subpœna for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpœna; and if any witness, after being duly served with such subpœna, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpœna, such judge may proceed to enforce obedience to the process or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpœna to testify issued by such court.

SUBPŒNAS DUCES TECUM.—*Sec.* 869. When either party in such suit applies to any judge of a United States court in such district or territory for a subpœna commanding the witness, therein to be named, to appear and testify before said commissioner at the time and place to be stated in the subpœna, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpœna, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpœna accordingly. And if the witness, after being served with such subpœna, fails to produce to the commissioner, at the time and place stated in the subpœna, any such paper, writing, written instrument, book or other document, being in his possession or power, and described in the

subpœna, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpœna or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties.

WITNESSES WHEN REQUIRED TO ATTEND, WHEN NOT.—*Sec.* 870. No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at, the place of examination are paid or tendered to him at the time of the service of the subpœna.[1]

[1] EXAMINATION UNDER COMMISSION.—All the interrogatories must be put to the witness or the deposition cannot be read: Winthrop *v.* Union Ins. Co., 2 Wash. C. C. 7; Richardson *v.* Golden, 3 *id.* 109. The laws of the states as to practice in such cases are not binding upon the courts of the United States: Bell *v.* Davidson, 3 Wash. C. C. 328; Curtis *v.* The Central R. Co., 6 McLean 401. The authority given the commissioner must be strictly pursued: Gupp *v.* Brown, 4 Dall. 410; Boudereau *v.* Montgomery, 4 Wash. 186. If a commission is issued to several parties, all must join in the return: Munns *v.* Dupont, 3 Wash. 31; Gupp *v.* Brown, 4 Dall. 410; Armstrong *v.* Brown, 1 Wash. 43.

NOTICE OF TIME AND PLACE FOR ORAL EXAMINATION.—If the application does not designate the time and place where depositions are to be taken, the party desiring them, or the commissioner, should give the opposite party notice thereof. See *post*, Equity Rule 67; Rhodes *v.* Selin, 4 Wash. 515; Knode *v.* Williamson, 17 Wall. 586; and the return of the officer should show that due notice was given, where that is required, and that the depositions were taken at the time and place designated: *Ibid.*; Boudereau *v.* Montgomery, 4 Wash. 186. The notice may be served on the opposite party or his attorney: Merrill *v.* Dawson, Hump. 563; s. c., 11 How. 375; and it may be served personally or by mail, or by leaving a copy with a member of the family at the residence of the opposite party: *Ibid.*; Walker *v.* Parker 5 Cr. C. C., 639; and it must give a reasonable time for him to appear: Nicholls *v.* White, 1 *id.* 58; but a deposition taken by one party, without notice, may be read

DEPOSITIONS IN THE DISTRICT OF COLUMBIA TO BE USED ELSEWHERE.—*Sec.* 871. When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any state or territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice of the Supreme Court of said district, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify

by the other party: Yeaton *v.* Fry, 5 Cr. C. C. 335. See also Shutte *v.* Thompson, 15 Wall. 151; York Company *v.* Central R. Co., 3 *id.* 113.

EXECUTION OF COMMISSION UNDER EQUITY RULE 67.—The return should show that the commissioner took the oath annexed to the commission, unless the deposition is taken before a commissioner of the circuit court, in which case it is not necessary that this should appear: Winter *v.* Simonton, 3 Cr. C. C. 104; Hoyt *v.* Hammekin, 14 How. 346; Frewall *v.* Bache, 1 Cr. C. C. 463. The return of the commissioner is *prima facie* evidence of the facts stated therein in relation to the execution of the commission: *Ibid.*; Boudereau *v.* Montgomery, 4 Wash. 186.

WHERE WRITTEN INTERROGATORIES ARE FILED.—If a foreign commission is asked for, and in accordance with the general rules of practice in such cases interrogatories and cross-interrogatories are filed, this would be a waiver of previous irregularities, and in such a case neither the parties nor their attorneys can appear before the commissioner on the examination, nor can the witness have a friend to assist him: Cunningham *v.* Otis, 1 Gall. 166; Knode *v.* Williamson, 17 Wall. 586; Sargeant *v.* Biddle, 4 Wh. 508; Mechanics' Bank *v.* Seton, 1 Pet. 299.

WHAT THE RETURN SHOULD SHOW.—The return should show that the witness was duly sworn, but it is not necessary to set out the form of the oath: Jones *v.* Oregon Central R. Co., 3 Saw. 523; Keene *v.* Meade, 3 Pet. 1. The return need not show in whose handwriting the deposition was taken down: *Ibid.* But if exhibits are referred to by the witness, they should be annexed to the deposition and identified by marks or references to show they are the identical exhibits referred to by the witness: Dodge *v.* Israel, 4 Wash. 323.

When a deposition has been used without objection in the court below, it cannot be objected to on appeal or writ of error in the Supreme Court: Brown *v.* Tarkington, 3 Wall. 377; Vattier *v.* Hinde, 7 Pet. 252; The Samuel, 1 Wh. 9; Evans *v.* Hettich, 7 *id.* 453.

Depositions are admissible in extradition cases under the act of August 3, 1882, § 5; see *In re* Ezeta, 62 Fed. Rep. 972.

For full directions as to the mode of procedure in taking depositions in equity causes, see Equity Rule No. 67.

in such suit, at a time and at a place within said district therein specified.

DEPOSITIONS WHEN TAKEN IN THE DISTRICT OF COLUMBIA WITHOUT PRESENCE OR CONSENT.—*Sec.* 872. When it satisfactorily appears by affidavit to any justice of the Supreme Court of the District of Columbia, or to any commissioner for taking depositions appointed by said court—

FIRST. That any person within said district is a material witness for either party in a suit pending in any state or territorial or foreign court;

SECOND. That no commission nor notice to take the testimony of such witness had been issued or given; and

THIRD. That, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof, such officer shall issue his summons, requiring the witness to appear before him at a place within the district, at some reasonable time, to be stated therein, to testify in such suit.

MANNER OF TAKING AND TRANSMITTING DEPOSITIONS IN SUCH CASES.—*Sec.* 873. Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offence on the trial of a suit.

WITNESS FEES IN SUCH CASES.—*Sec.* 874. Every witness appearing and testifying under the said provisions relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance.

LETTERS ROGATORY FROM UNITED STATES COURTS.—*Sec.* 875. When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is exe-

cuted by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it was executed. On receiving the same the said minister or consul shall indorse thereon a certificate stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same. When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts.[1]

SUBPŒNAS TO RUN INTO OTHER DISTRICTS.—*Sec.* 876. Subpœnas for witnesses who are required to attend a court of the United States, in any district, may run into any other district; *provided*, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same.[2]

WITNESSES ON THE PART OF THE UNITED STATES.—*Sec.* 877. Witnesses who are required to attend any term of a circuit or district court on the part of the United States shall be subpœ-

[1] As amended by the act of Feb. 28, 1876, ch. 69, 19 Stat. L. 241. See Rev. Stat. §§ 4071–4074. See Nelson *v.* U. S., Pet. C. C. 235, as to form of letters rogatory and as to sufficiency of answers to interrogatories.

[2] The distance a witness resides from the place of holding the court is to be determined not by an air line, but by the actual distance by the most convenient and usual routes: *Ex parte* Beebees, 2 Wall. Jr. 127. And if a witness living within another district, but not more than one hundred miles from the place of trial, has been duly subpœnaed, but fails to attend, the court may issue an attachment for him: United States *v.* Williams, 4 Cr. C. C. 372.

naed to attend to testify generally on their behalf, and not to depart court without leave thereof, or of the district attorney ; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.

WITNESSES ON BEHALF OF INDIGENT DEFENDANTS IN CRIMINAL CASES.—*Sec.* 878. Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defence; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the court in term, or any judge thereof in vacation, may order that such witnesses be subpœnaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States.

RECOGNIZANCES OF WITNESSES IN CRIMINAL CASES.—*Sec.* 879. Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offence against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties in his discretion, for his appearance to testify in the case. And where the crime or offence is charged to have been committed on the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused whose testimony in his opinion is important and is in danger of being otherwise lost.[1]

RECOGNIZANCES IN THE DISTRICT OF VERMONT.—*Sec.* 880. In the district of Vermont all recognizances of witnesses taken by any magistrate in said district for their appearance to testify in any case cognizable either in the district or circuit court thereof

[1] See §§ 848, 1014.

shall be to the circuit court next thereafter to be held in the said district.

RECOGNIZANCES MAY BE REQUIRED AT ANY TIME BY DISTRICT ATTORNEY.—*Sec.* 881. Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance with or without sureties, at his discretion, to appear to testify therein; and for that purpose may issue a warrant against such person under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge.[1]

COPIES OF BOOKS AND OTHER PAPERS IN ANY EXECUTIVE DEPARTMENT.—*Sec.* 882. Copies of any books, records, papers or documents in any of the executive departments, authenticated under the seals of such departments respectively, shall be admitted in evidence equally with the originals thereof.[2]

[1] See § 848.

[2] The term "papers or documents" in this section refers only to such documents as are made by an officer or agent of the government in the discharge of his official duty; and if it was not the duty of such officer or agent to file a paper or document in the department, an authenticated copy thereof would not be competent evidence: Block *v.* The United States, 7 Ct. Cl. 406.

If a party desires to use such paper or document as evidence in a suit against the United States, he must procure a certified copy, and cannot use a mere copy upon notice to the government to produce the original: Barney *v.* Schmeider, 9 Wall. 248; Chadwick *v.* United States, 3 Fed. Rep. 750.

WHAT IS SUFFICIENT AUTHENTICATION OF PAPERS OR DOCUMENTS.—The certificate of the Secretary of State, under the seal of his department, is competent evidence to prove the diplomatic character of a minister accredited to the United States and the time when he was recognized as such: United States *v.* Liddle, 2 Wash. 205; United States *v.* Beamer, Bald. 234. See also White *v.* St.

COPIES AS EVIDENCE OF PAPERS IN THE OFFICE OF SOLICITOR OF TREASURY.—*Sec.* 883. Copies of any documents, records, books or papers in the office of the Solicitor of the Treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as Solicitor for the time, shall be evidence equally with the originals.

PAPERS EXECUTED BY THE COMPTROLLER OF THE CURRENCY.—*Sec.* 884. Every certificate, assignment and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.

CERTIFICATES OF ORGANIZATION OF NATIONAL BANKS.—*Sec.* 885. Copies of the organization certificate of any national banking

Guirons, Minor 331; Catlett *v.* Pacific Ins. Co., 1 Paine 594; Bleecker *v.* Bond, 3 Wash. 529; Chadwick *v.* United States, 3 Fed. Rep. 750. But the mode of authentication prescribed by the statute must be strictly pursued: Block *v.* United States, 7 Ct. Cl. 406. Thus, a copy of an adjudication of a claim in the Treasury Department, certified by the Auditor, but without the seal of the department, is not competent evidence: Wickliffe *v.* Hill, 3 Litt. 330.

A copy of the bond of a collector of internal-revenue authenticated by the Secretary of the Treasury, and under the seal of the Treasury Department, is competent evidence: Chadwick *v.* United States, 3 Fed. Rep. 750; and a quarterly return required to be made and filed in the department, duly certified by the Secretary, and under the seal of the department, is competent evidence: *Ibid.* So a certified copy of similar papers in the office of the Quartermaster, under his hand and the seal of the department, would be competent evidence.

If an officer having charge of a paper certifies that a paper is a true copy of the original, and the head of the department certifies as to the official character of the former under his hand and seal of office, the paper is properly authenticated: Thompson *v.* Smith, 2 Bond 320; Crowell *v.* Hopkinton, 45 N. H. 9; Ballew *v.* U. S., 160 U. S. 187.

By the Act of July 26, 1892, ch. 256, § 3, 27 Stat. L. 272, 2 Supp. R. S. 51, the Commissioner of Indian Affairs shall cause a seal to be made and provided for his office, "with such device as the President of the United States shall approve, and copies of any public documents, records, books, maps or papers belonging to or on the files of said office, authenticated by the seal and certified by the Commissioner thereof, or by such officer as may, for the time being, be acting as or for such Commissioner, shall be evidence equally with the originals thereof."

association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate.[1]

TRANSCRIPTS OF BOOKS OF THE TREASURY.—*Sec.* 886. When suit is brought in any case of delinquency of a revenue officer or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the Register and authenticated under the seal of the department, or, when the suit involves the accounts of the War or Navy Departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts or other papers re ating to, or connected with, the settlement of any account between the United States and an individual, when certified by the Register, or by such Auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court; *provided*, that where a suit is brought upon a bond or other sealed instrument, and the defendant pleads "*non est factum*," or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract or other paper specified in such affidavit.[2] By the act of March 2,

[1] See § 5135.

[2] This section extends to any case of delinquency on the part of any person accountable for public money: Bechtel *v.* United States, 597; and it applies to sureties of such persons as well as to the defaulting principal: United States *v.* Gaussen, 19 Wall. 198. See also Chadwick *v.* United States, 3 Fed. Rep. 750; United States *v.* Eggleston, 4 Saw. 199; Soule *v.* United States, 100 U. S 8; Walton *v.* United States, 9 Wh. 651; United States *v.* Eckford, 1 How. 250; but a certified transcript from the books and proceedings of the Treasury Department is only *prima facie* evidence of the facts stated

1895,[1] the transcripts from the books and proceedings of the Department of the Treasury and the copies of bonds, contracts and other papers provided for in Revised Statutes, section 886, shall hereafter be certified by the Secretary or an Assistant Secretary of the Treasury under the seal of the Department.

TRANSCRIPTS OF BOOKS OF TREASURY IN CASE OF EMBEZZLEMENT. —*Sec.* 887. Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury Department, as provided by the preceding section.

COPIES OF RETURNS IN RETURNS-OFFICE.—*Sec.* 888. A copy of any return of a contract returned and filed in the returns-office of the Department of the Interior, as provided by law, when certified by the clerk of the said office to be full and complete, and when authenticated by the seal of the Department, shall be evidence in any prosecution against any officer for falsely and corruptly swearing to the affidavit required by law to be made by

therein, so far as the same are authorized by law; and any error therein may be corrected: *Ibid.* An authenticated transcript from the books is competent *prima facie* evidence to show that an officer received the money charged against him, and need not be accompanied by authenticated copies of his receipts: Bruce *v.* United States, 17 How. 437. See also United States *v.* Jones, 8 Pet. 375; United States *v.* Martin, 2 Paine 68; United States *v.* Kuhn, 4 Cr. C. C. 401. The transcript is also *prima facie* evidence of the capacity in which the officer acted: Smith *v.* United States, 5 Pet. 292; but the officers of the Treasury Department cannot certify to matters that do not come within official knowledge: United States *v.* Jones, 8 Pet. 375; United States *v.* Kuhn, 4 Cr. C. C. 401.

A transcript or copy of books, or a portion of them, duly authenticated by the proper head of a department, and under its seal, is competent evidence: United States *v.* Buford, 3 Pet. 12; United States *v.* Jones, 8 *id.* 375; United States *v.* Gaussen, 19 Wall. 198. See U. S. *v.* Bosbyshell, 73 Fed. Rep. 616; Moses *v.* U. S., 166 U. S. 71.

The statement of a gross amount contained in a transcript is not competent evidence thereof, but it should contain a statement of the items of the account on both sides, both the debits and the credits, as they were acted upon by the accounting officers of the government: *Ibid.*; United States *v.* Edward, 1 McLean 467; United States *v.* Vanzandt, 2 Cr. C. C. 338; Gratiot *v.* United States, 15 Pet. 336; Hoyt *v.* United States, 10 How. 109; *Ex parte* Randolph, 2 Brock 447; United States *v.* Collier, 3 Blatch. 325.

[1] Act of March 2, 1895, ch. 177, § 10, 28 Stat. L. 764, etc., 2 Supp. R. S. 420.

such officer in making his return of any contract, as required by law, to said returns-office.[1]

COPIES OF POST-OFFICE RECORDS AND OF AUDITOR'S STATEMENT.—*Sec.* 889. Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Sixth Auditor, and transcripts from the money-order account-books of the Post-Office Department, when certified by the Sixth Auditor, under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.

COPIES OF STATEMENTS BY POST-OFFICE DEPARTMENT.—*Sec.* 890. In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the Sixth Auditor, of the statement of any postmaster, special agent or other person employed by the Postmaster-General or the Auditor for that purpose, that he has mailed a letter to such delinquent postmaster at the post-office where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail; and that payment of such balance has not been received, within the time designated in his instructions, shall be received as sufficient evidence in the courts of the United States, or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled and a demand has been made for the balance appearing to be due, and afterward allowances are made or credits entered, it shall not be necessary to make a further demand for the new balance found to be due.

COPIES OF RECORDS OF GENERAL LAND-OFFICE.—*Sec.* 891. Copies of any records, books or papers in the General Land-Office, authenticated by the seal and certified by the Commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal

[1] See § 3744.

exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record.[1]

COPIES OF RECORD OF PATENT-OFFICE.—*Sec.* 892. Written or printed copies of any records, books, papers or drawings belonging to the Patent-Office, and of letters-patent, authenticated by the seal and certified by the Commissioner or acting Commissioner thereof, shall be evidence in all cases wherein the originals could be evidence;[2] and any person making application therefor and paying the fee required by law shall have certified copies thereof.[3]

COPIES OF FOREIGN LETTERS-PATENT.—*Sec.* 893. Copies of the specifications and drawings of foreign letters-patent, certified as provided in the next preceding section, shall be *prima facie* evidence of the fact of the granting of such letters-patent and of the date and contents thereof.

COPIES OF SPECIFICATIONS AND DRAWINGS CERTIFIED BY COMMISSIONER OF PATENTS.—*Sec.* 894. The printed copies of specifications and drawings of patents which the Commissioner of Patents is authorized to print for gratuitous distribution and to deposit

[1] This section does not dispense with the signing and countersigning of a patent for lands, as this must be signed by the President and countersigned by the recorder: McGarrahan *v.* Mining Co., 96 U. S. 316. See also Hanrick *v.* Barton, 16 Wall. 166.

A copy of a plot and description, duly authenticated by a certificate of the Commissioner of the Land-Office under his seal of office, is competent evidence: Harris *v.* Barnett, 4 Black. 369. See §§ 2469, 2470.

[2] See New York *v.* Amer. Cable N. Co., 26 U. S. App. 7.

[3] Under this section a transcript of certain documents on file in the Patent-Office is competent evidence, although it does not purport to be a copy of the whole: Toohey *v.* Harding, 1 Fed. Rep. 174.

Patents are public records, and consequently all persons have a right to obtain copies of them. As these records are in the care and custody of the Commissioner of Patents, it is his duty to give authenticated copies of the same to any person who shall demand it and pay or tender the fees therefor, as soon as he can conveniently; and a failure to do so subjects the Commissioner to an action for damages sustained thereby. But a demand accompanied by insolence, rudeness and insult is not a legal demand: Bayden *v.* Burke, 14 How. 575. See also Davis *v.* Grey, 17 Ohio St. 335; Sherman *v.* Champlain Co., 31 Vt. 162; Stone *v.* Palmer, 28 Mo. 539; Stoner *v.* Ellis, 6 Ind. 152; Bullock *v.* Wallingford, 55 N. H. 619.

in the capitals of the states and territories and in the clerk's offices of the district courts shall, when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained.

EXTRACTS OF JOURNALS OF CONGRESS.—*Sec.* 895. Extracts from the journals of the Senate or of the House of Representatives, and of the executive journal of the Senate when the injunction of secrecy is removed, certified by the Secretary of the Senate or by the Clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court.

COPIES OF RECORDS IN OFFICE OF UNITED STATES CONSUL.—*Sec.* 896. Copies of all official documents and papers in the office of any consul, vice-consul or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States.[1]

TRANSCRIPTS CERTIFIED BY THE CLERKS OF DISTRICT COURTS IN TEXAS, FLORIDA, WISCONSIN AND OTHER STATES.—*Sec.* 897. The transcripts into new books made by the clerks of the district courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa and Kansas, in pursuance of the act of June 27, 1864, chapter 165, from the record and journals transferred by them respectively, under the same act, to the clerks of the circuit courts in said districts, when certified by the clerks respec-

[1] The certificate of a consul is not evidence of any matter not within the provisions of this section, as its provisions are in derogation of the common law rules of evidence and therefore must be strictly construed: Levy *v.* Burley, 2 Sum. 355. But the certificate of a consul is competent to prove his official acts: Brown *v.* The Independence, Crabbe 54; and that a ship's papers were lodged with him: United States *v.* Mitchell, 2 Wash. 478; and that a seaman was discharged in a foreign port by his own consent: Lamb *v.* Briard, Abb. Ad. 367. But a consul's certificate is not competent evidence to prove acts that are not his official acts and of which he has no personal knowledge: Brown *v.* The Independence, Crabbe 54; or to prove the facts to justify an imprisonment of a seaman by a master in a foreign port: Johnson *v.* The Coriolanus, *Ibid.* 239; or the refusal of a master of a vessel to deposit the register of the departure or arrival of a vessel: Levy *v.* Burley, 2 Sum. 355; or that a paper is a true copy of a foreign statute: Church *v.* Hubert, 2 Cr. 187. See § 1707.

tively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit courts respectively of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as if made by the clerk of the court in which the proceedings were had.

TRANSCRIBED RECORDS CERTIFIED BY CLERKS IN NORTH CAROLINA.—*Sec.* 898. The transcripts into new books made by the clerks of the circuit and district courts for the western district of North Carolina, in pursuance of the act of June 4, 1872, chapter 282, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit and district courts respectively, of transcripts of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were transcribed.

WHEN ORIGINAL RECORDS ARE LOST OR DESTROYED.—*Sec.* 899. When the record of any judgment, decree or other proceedings of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had.

SAME SUBJECT.—*Sec.* 900. When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application

to be entered of record, and a copy of it shall be served personally upon every person interested therein, together with written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had if the same had not been lost or destroyed.

SAME SUBJECT.—*Sec.* 901. When any cause has been removed to the Supreme Court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed.

SAME SUBJECT.—*Sec.* 902, as amended by the act of January 31, 1879.[1] In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any non-resident of the district in which such court is held anywhere within the jurisdiction of the United States or in any foreign country; the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal.

RECORDS IN CASE OF LOSS.—*Sec.* 903, as amended by the act of January 31, 1879.[2] A certified copy of the official return, or any other official paper of the United States attorney, marshal or clerk or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be

[1] Act of January 31, 1879, ch. 39, § 1, 20 Stat. L. 277, 1 Supp. R. S. 211.

[2] Act of January 31, 1879, ch. 39, § 2, 20 Stat. L. 277.

filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return, paper or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of the judgment or decree shall appear from such return, paper or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in the said court. And in all cases where any of the files, papers or records of any court of the United States have been or shall be lost or destroyed, the files, records and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files and papers, shall have the same force and effect, to all intents and purposes, as the original thereof would have been entitled to.

SEC. 904, as amended by the act of January 31, 1879.[1] That whenever any of the records or files in which the United States are interested in any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices and other books and papers as said judges shall think proper. Said judges may direct the performance, by the clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation for services in the matter and for lawful disbursements as may be approved by the Attorney-General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund.

AUTHENTICATION OF LEGISLATIVE PROCEEDINGS AND PROOF OF JUDICIAL PROCEEDINGS.—*Sec.* 905. The acts of the legislature of any state or territory, or of any country subject to the jurisdic-

[1] Act of January 31, 1879, ch. 39, § 3, 20 Stat. L. 278.

tion of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.[1]

[1] ACTS OF THE LEGISLATURE OF ANY STATE, TERRITORY OR COUNTRY. —The mode of authentication prescribed by this section is not exclusive of any which the states may adopt. A state may provide for the authentication of the records of another state, and require less proof than prescribed by this section: Kingman *v.* Cowles, 103 Mass. 283; Latterett *v.* Cook, 1 Ia. 1; Parker *v.* Williams, 7 Cal. 247; Ordway *v.* Conroe, 4 Wis. 45; Lothrop *v.* Blake, 3 Pa. St. 483; Goodwyn *v.* Goodwyn, 25 Ga. 203; Kean *v.* Rice, 12 S. & R. 203.

Printed copies of statutes with interlineations may be used if duly authenticated: United States *v.* Amedy, 11 Wh. 392; and it seems that an exemplification of an act of the legislature under the seal of the state is sufficient without an attestation by any state officer: *Ibid.;* United States *v.* Johns, 4 Dall. 412; 1 Wash. 363; Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208.

But a pamphlet with no seal attached to it is not competent evidence of the law of another state: Craig *v.* Brown, 1 Pet. C. C. 352.

But the federal courts will take notice of the public laws of the states: Owing *v.* Hull, 9 Pet. 607; McNiel *v.* Holbrook, 12 *id.* 84; Mewster *v.* Spalding, 6 McLean 24; Jones *v.* Hayes, 4 *id.* 521; Drawbridge Co. *v.* Shepherd, 20 How. 227; Harpending *v.* Reformed Dutch Church, 16 Pet. 455.

THE SEAL. — A seal within the meaning of the statute is an impression upon wax, wafer or some other tenacious substance, and an impression upon the paper only is not a seal: Coit *v.* Millikin, 1 Den. 376. If there is no seal attached to an exemplified record, nor certificate that the court has no seal, it is not competent evidence: McFarlane *v.* Harrington, 2 Bay 554; Allen *v.* Thaxter, 1 Blackf. 399; but a transcript is admissible, though the clerk certifies that he affixes his seal of office instead of the seal of the court: McLean *v.* Winchester, 17 Mo. 49; Coffie *v.* Neely, 2 Heisk. 304; Clark *v.* Depew, 25 Pa. St. 409; and if the clerk affixes his private seal and certifies the court has no seal, the private seal will not vitiate the certificate: Flourenoy *v.* Duke, 2 Brev. 256; Strade *v.* Churchill, 2 Litt. 75.

The fact that the court whose record is certified has no seal should be shown either in the certificate of the

PROOFS OF RECORDS IN OFFICES NOT APPERTAINING TO COURTS. —*Sec.* 906. All records and exemplifications of books, which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not

clerk or the judge, and if the attestation of the clerk recites that there is no seal, the certificate of the judge that the attestation is in due form is sufficient: Simons *v.* Cook, 29 Ia. 324; Craig *v.* Brown, 1 Pet. C. C. 352.

RECORDS.—APPLICATION OF STATUTE.—The statute has no application to the records of the federal courts, but is limited to the records of the courts of any state or territory or country subject to the jurisdiction of the United States: Mason *v.* Laurason, 1 Cr. C. C. 190; Dean *v.* Chapin, 22 Mich. 275; Adams *v.* Way, 33 Conn. 419; Williams *v.* Wilkes, 14 Pa. St. 228; Adams *v.* Lesher, 2 Blackf. 241; Dorsey *v.* Maury, 18 Miss. 298; Steere *v.* Tenney, 50 N. H. 461.

The statute has application only to courts of record; courts of justices of the peace are not generally courts of record, but may be so under local statutes. If they are made courts of record by statute, the statute should be produced and proved, or the certified record of his court will not be competent evidence: Thomas *v.* Robinson, 3 Wend. 267; Kean *v.* Rice, 12 S. & R. 203; Gay *v.* Lloyd, 1 Greene (Ia.) 78; Pelton *v.* Platner, 13 Ohio 209; Draggoo *v.* Graham, 9 Ind. 212; Silver Lake Bk. *v.* Harding, 5 Ohio 545; Warren *v.* Flagg, 19 Mass. 448; Ault *v.* Zehering, 38 Ind. 429.

If a justice holds a court of record he is competent to certify a record of his court, although he may have no clerk or seal, and is not only the presiding magistrate, but the clerk. In such a case he may certify that he is the presiding magistrate and clerk and that he has no seal, and that the attestation is in due form, and subscribe it as justice of the peace: Bissel *v.* Edwards, 5 Day 363; Blodget *v.* Jordan, 6 Vt. 580; Brown *v.* Edson, 23 *id.* 435; Starkweather *v.* Loomis, 2 *id.* 573; Scott *v.* Cleveland, 3 Mon. 62.

COMPETENT EVIDENCE IN THE FEDERAL COURTS.—The records and proceedings of the state courts, duly authenticated, are competent evidence in all federal courts: Mills *v.* Duryee, 7 Cr. 481; Galpin *v.* Page, 3 Saw. 93; United States *v.* Biebusch, 1 Fed. Rep. 213; Pennoyer *v.* Neff, 95 U. S. 714; and the transcript of a state court, properly certified by the clerk under the seal of the court, is admissible in a federal court sitting in the same state without a certificate of the judge that it is in due form: Mewster *v.* Spalding, 6 McLean 24. The provision is also applicable to the federal courts in the District of Columbia: Mills *v.* Duryee, 7 Cr. 481.

RECORDS AND PROCEEDINGS THAT MAY BE AUTHENTICATED.—If a record purports to be a confession of a judgment before the clerk of a state court, it is within the provision of this section: Sipes *v.* Whitney, 30 Ohio St. 69; Randolph *v.* Kessler, 21 Mo. 557; Coleman *v.* Waters, 12 W. Va. 278.

The decree of a court of chancery: Patrick *v.* Gibbs, 17 Tex. 275; or a judgment to enforce a vendor's lien: Seaborn *v.* Henry, 30 Ark. 469; or for the maintenance of a bastard child: State *v.* Helmer, 21 Ia. 370;

appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a

or on a bond of recognizance: Spencer *v.* Brockway, 1 Ohio 260; or for a penalty: Healy *v.* Root, 28 Mass. 389. may be certified under the provisions of this statute. So may the proceeds of probate courts: First Nat. Bk. *v.* Kidd, 20 Minn. 234; Bright *v.* White, 8 Mo. 421; Haile *v.* Hill, 13 *id.* 612; Hauze *v.* Hause, 16 Tex. 598; Melvin *v.* Lyons, 18 Miss. 78; Slack, *v.* Walcott, 3 Mass. 508; Case *v.* McGee, 8 Md. 9; Doe *v.* Doe, 31 Ga. 593; Lee *v.* Hamilton, 3 Ala. 529; Robertson *v.* Barbour, 6 Mon. 523; but unless a guardian's bond is a matter of record in the probate court, it cannot be authenticated so as to be evidence under this section: Carlisle *v.* Tuttle, 30 Ala. 613. See also Martin *v.* Martin, 22 *id.* 86; Russel *v.* Kearney, 27 Geo. 96; Warren *v.* Wade, 7 Jones (N. C.) 494; Pickett *v.* Bates, 3 La. An. 627.

The decision of a commissioner is not a judgment of a court, although he is an officer of it: Taylor *v.* Barron, 30 N. H. 78; but if his decision is accepted and recorded by the court as its judgment, it may be authenticated under this statute: Taylor *v.* Barron, 35 *id.* 484.

THE CLERK'S CERTIFICATE.—If the record is not properly attested and certified it cannot be used as evidence: Craig *v.* Brown, 1 Pet. C. C. 352; Bissel *v.* Edwards, 5 Day 363; Barrow *v.* Steel, 65 Mo. 611.

The statute does not prescribe the form of the attestation or certificate, but the form is immaterial where there is a judge's certificate: Horner *v.* Spilman, 78 Ill. 206; White *v.* Strother, 11 Ala. 720; Thompson *v.* Manrow, 1 Cal. 428. See O'Hara *v.* Mobile and O. R. Co., 76 Fed. Rep. 718.

The law does not require that the clerk shall certify the transcript as a full one of the whole proceedings, and if the certificate states that the transcript is truly copied from the record of the proceedings of the court, when it appears to be a complete record of a suit from the commencement to the termination of the suit, it will be sufficient: Mudd *v.* Beauchamp, Litt. Sel. Cas. 142; Reber *v.* Wright, 68 Pa. St. 471; Clark *v.* Depew, 25 *id.* 409. And the truth of the matters certified cannot be contradicted: McCormic *v.* Deaver, 22 Md. 187.

THE JUDGE'S CERTIFICATE.—It is necessary that there be a certificate of the presiding judge that the attestation is in due form, and if there is no such certificate the exemplification is not competent evidence. The mode of attestation of records and proceedings of courts in the various states to make them competent evidence is usually prescribed by the statutes of the several states, and the section under consideration requires the mode of attestation for this purpose to conform to that used in the state where the court was held and not to the forms used in the state where it is offered: Duncommon *v.* Hysinger, 14 Ill. 14; Craig *v.* Brown, 1 Pet. C. C. 352; White *v.* Strother, 11 Ala. 720; Thrasher *v.* Ingram, 32 *id.* 645; Snyder *v.* Wise, 10 Pa. St. 157; Ordway *v.* Conroe, 4 Wis. 45; Brackett *v.* People, 64 Ill. 170; Corfield *v.* Coryell, 4 Wash. C. C. 371; Pepin *v*

certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the governor or secretary of state, the chancellor or keeper of the great seal, of the state or territory or country, that the said

Lachenmyer, 45 N. Y. 27; Hackett *v.* Bonnell, 16 Wis 471; Washabaugh *v.* Entriken, 34 Pa. St. 74; Hutchins *v.* Gerrish, 52 N. H. 205; Trigg *v.* Conway, Hem. 538.

The certificate should show that he was the presiding judge of the court where the proceedings took place: Little *v.* Alison, 8 Ga. 201; Pratt *v.* King, 1 Ore. 49; Brown *v.* Johnson, 42 Ala. 208; Taylor *v.* Kilgore, 33 *id.* 214; Bennett *v.* Bennett, 1 Deady 300; Erb *v.* Scott, 14 Pa. St. 20; Hatcher *v.* Rocheleau, 18 N. Y. 86; Barlow *v.* Steel, 65 Mo. 611; Thrasher *v.* Ingram, 32 Ala. 645; Newman *v.* Goza, 14 La. An. 642; Haynes *v.* Cowen, 11 Kans. 637.

Objections to the admission of a record on the ground that it is not properly authenticated should be made in the court below; they cannot be raised for the first time in the Supreme Court: Carpenter *v.* Strange, 141 U. S. 87. This rule that confines the appellate court to the consideration of questions raised in the trial court is of general application: Morrill *v.* Jones, 106 U. S. 467; Spies *v.* Illinois, 123 *id.* 131; Brooks *v.* Missouri, 124 *id.* 394; Hawkins *v.* Glenn, 131 *id.* 319; Dohl *v.* Montana, 132 *id.* 260; Burns *v.* Rosenstein, 135 *id.* 449; Toplitz *v.* Hedden, 146 *id.* 252. Objections to the admission of testimony must be made when it is offered: Benson *v.* U. S., *Ibid.* 325, and see Reagan *v.* Aiken, 138 *id.* 109.

EFFECT OF AN AUTHENTICATED RECORD OF A JUDGMENT AS EVIDENCE.—If the record of a judgment is proved in the manner prescribed by the statute, the evidence is of as high a nature as the inspection of the same record or as an exemplification of the record would be in any other court of the same state: Mills *v.* Duryee, 7 Cr. 481; Green *v.* Sarmiento, 3 Wash. 17; s. c., 1 Pet. C. C. 74; Public Works *v.* Columbia College, 17 Wall. 521; McElmoyle *v.* Cohen, 13 Pet. 312. But if the judgment would not be valid under the laws of the state where it is offered in evidence, it cannot be deemed valid unless it is shown to be so by proof of the laws of the state where it was rendered: Crafts *v.* Clark, 31 Ia. 77. See also McFarland *v.* White, 13 La. An. 394; Porcheller *v.* Bronson, 50 Tex. 555; Newton *v.* Mutual Benefit Life Ins. Co., 22 N. Y. 595.

If a judgment by confession under a power of attorney may be set aside in the state where it was rendered, it may be examined and annulled in another state: Brown *v.* Parker, 28 Wis. 21. So if a judgment would not be a bar to a subsequent action in the same state, it would not be a bar to an action in another state: Matoon *v.* Clapp, 8 Ohio 248.

If a judgment against a corporation cannot be enforced against stockholders individually in the state where it was rendered, it cannot bind them in another state where a judgment could be so enforced: Sumner *v.* Marcy, 3 W. & M. 105. See also Killam *v.* Toms, 38 Wis. 592; Oldens *v.* Hallett, 5 N. J. L. 466; Sims *v.* Sims, 75 N. Y. 466; Commonwealth *v.* Green, 17 Mass. 514.

Judgments are conclusive between the parties in every state except for such causes as would be sufficient to

attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of the court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of

set aside the judgment in the state where it was rendered: McElmoyle *v.* Cohen, 13 Pet. 312; Green *v.* Sarmiento, 3 Wash. 17; Mills *v.* Duryee, 7 Cr. 481; Belton *v.* Fisher, 44 Ill. 32; Wheeler *v.* Raymond, 8 Cow. 311; Robert *v.* Hodges, 16 N. J. Eq. 299.

Efficacy of a judgment in another state.—A judgment in one state cannot carry with it into another state any efficacy as a judgment to be enforced by execution. When duly authenticated, it is only the evidence of an indebtedness and the ground for another judgment in the forum of another state, which can only be enforced by execution under the laws of the latter state: McElmoyle *v.* Cohen, 13 Pet. 312; Beale *v.* Berryman, 30 N. J. L. 216; McLure *v.* Bencene, 2 Ired. Eq. 513; Carter *v.* Bennett, 6 Fla. 214; Harness *v.* Green, 20 Mo. 316; Barrett *v.* Failing, 3 Fed. Rep. 471.

Appeal or writ of error.—The judgment of the inferior court is presumed to remain unreversed until the contrary is shown: Schoonmaker *v.* Lloyd, 9 Rich. 173; and the pendency of a writ of error or appeal where no bond is given to stay proceedings constitutes no defence to an action on the judgment in another state: McJilton *v.* Love, 13 Ill. 486; McArthur *v.* Goddin, 12 Bush. 274; DeWolf, 33 Pa. St. 45. See also Paine *v.* Schenectady Ins. Co., 11 R. I. 411; Bank *v.* Wheeler, 28 Conn. 433.

Where a decree was merely interlocutory.—If a decree was merely interlocutory under the laws of the state where it was rendered, it will be so considered in another state: Public Works *v.* Columbia College, 17 Wall. 521; Whitaker *v.* Bramson, 2 Paine 209. But a judgment which on its face purports to be a final judgment will in the absence of evidence to the contrary be treated as a final one in another state: Rowland *v.* Jarvis, 5 La. An. 43. See also Lawrence *v.* Jarvis, 32 Ill. 125.

Decrees in relation to land in another state.—No decree in one state can operate as a conveyance of land in another; nor will a conveyance of a commissioner appointed under a decree of a court in one state divest a legal title to real estate in another state: Watts *v.* Waddle, 1 McLean 200; s. c., 6 Pet. 389; Tardy *v.* Morgan, 3 McLean 358; Burnley *v.* Stevenson, 24 Ohio St. 474; see also Davis *v.* Headley, 22 N. J. 115.

Where the court had jurisdiction of a cause the judgment cannot be impeached collaterally for errors and irregularities.—It is a general principle of the law that where a court had jurisdiction in a cause both of the persons and the subject-matter a judgment rendered therein is conclusive, unless reversed or modified on appeal or writ of error; and no judgment can be questioned or impeached, collaterally, for any errors or irregularities which could have been corrected on appeal or writ of error: Patterson *v.* The State, 12 Green (Ia.) 492; State *v.* Helmer, 21 Ia. 370; Henderson *v.* Staniford, 105 Mass. 504.

Attorney's ignorance, negli-

his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor or keeper of the great seal, it shall be under the great seal of the state, territory or country aforesaid in which it is made. And

GENCE OR FRAUD. — Although a court of equity in one state may grant relief against a judgment entered in another where it is sought to obtain a judgment in the former state upon the judgment in the latter, in all cases where relief would be granted in the state where the judgment was first rendered, still a judgment in another state cannot be impeached on the ground of the ignorance, negligence or bad faith of an attorney: Amory *v.* Amory, 3 Biss. 266; Crawford *v.* White, 17 Ia. 560; Sipes *v.* Whitney, 30 Ohio St. 69. Nor can a judgment be attacked in a collateral manner on the ground that it was procured by fraud, and the issues re-opened and determined by the judgment and evidence on the original trial: Field *v.* Saunderson, 34 Mo. 542; Barnard *v.* Fowler, 119 Mass. 262; Johnson *v.* Dobbins, 35 Leg. Int. 242; Davis *v.* Headley, 22 N. J. Eq. 115; Rogers *v.* Gwinn, 21 Ia. 38; Bicknel *v.* Field, 8 Paige 440; Luckenbach *v.* Anderson, 47 Pa. St. 123. But where an attorney for the plaintiff assured the defendant that nothing further should be done in the suit until further notice, and the attorney subsequently proceeded and obtained judgment without notice to the defendant, this was held, under the peculiar circumstances of the case, to be such a fraud as to entitle the defendant to relief therefrom: Pearce *v.* Olney, 20 Conn. 544; Ward *v.* Quinlivin, 57 Mo. 425; see also Clay *v.* Clay, 13 Tex. 195, where it was held that fraud in obtaining a judgment without the credit of a payment made during the pendency of the original suit might be shown in a suit on the judgment in another state, and that the payment might be there shown; see also Davis *v.* Smith, 5 Ga. 274; Buford *v.* Buford, 4 Munf. 241.

STATUTE OF LIMITATIONS.—The universal doctrine in reference to the laws of limitation applicable to judgments is that in a suit on a judgment the law of limitations of the state where the suit is brought is applicable, and not the statutes of the state where the judgment was originally rendered: McElmoyle *v.* Cohen, 13 Pet. 312; Bacon *v.* Howard, 20 How. 22; Bank *v.* Dalton, 9 *id.* 522; Robinson *v.* Payton, 4 Tex. 276; Pryor *v.* Moore, 8 *id.* 250; Kirkman *v.* Hendrick, 8 *id.* 253; Reid *v.* Boyd, 13 *id.* 241; Stockwell *v.* Coleman, 10 Ohio St. 33; Christmas *v.* Russell, 5 Wall. 290; Meek *v.* Meek, 45 Ia. 294.

JURISDICTION OF THE PERSON NECESSARY.—There must be some service of original process or an appearance, and a personal judgment rendered without either is void in another state: Warren Man. Co. *v.* Etna Ins. Co., 2 Paine 501; Westervelt *v.* Lewis, 2 McLean 511; De Arcy *v.* Ketchum, 11 How. 165; Jones *v.* Warner, 81 Ill. 343; Tait *v.* De Ende, 18 La. 33; McLaurens *v.* Monroe, 30 Mo. 462; Rangley *v.* Webster, 11 N. H. 299; Middlesex Bk. *v.* Butman, 29 Me. 19; Woodward *v.* Tremere, 23 Mass. 354; Bicknell *v.* Field, 8 Paige 440; Jardine *v.* Richert, 39 N. J. L. 165.

PRESUMPTIONS FROM RECITAL IN THE RECORD.—If a record shows service, this would be at least presumptive evidence that the service was

the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in

made in accordance with the laws of the state where the judgment was rendered: Dunbar *v.* Hallowell, 34 Ill. 168; Trayden *v.* Justis, 24 La. An. 222; Wilson *v.* Jackson, 10 Mo. 329; Downer *v.* Shaw, 22 N. H. 277.

THE RECORD SHOWING SERVICE MAY BE CONTRADICTED.—Although an exemplified record of a court of another state may show that there was personal service of the original process, and this is *prima facie* evidence of the fact and of the jurisdiction of the court, yet the defendant may controvert this fact and by proof show that there was no such service: Knowles *v.* Gas Light Co., 19 Wall. 58; s. c., 2 Dill. 421; Pollard *v.* Baldwin, 22 Ia. 328; Lowe *v.* Lowe, 40 *id.* 220; Webster *v.* Hunter, 50 *id.* 215; Kingsbury *v.* Yniestra, 59 Ala. 320; Cheen *v.* Gray, 51 Tex. 112; Marx *v.* Fore, 51 Mo. 69; McDermott *v.* Clary, 107 Mass. 501; Norwood *v.* Cobb, 15 Tex. 500; Carleton *v.* Bickford, 79 Mass. 591; Lincoln *v.* Tower, 2 McLean 473.

So evidence may be introduced to prove that a vessel was not seized within the county where the judgment was rendered, although the certified record states that the seizure was within the county: Thompson *v.* Whitman, 18 Wall. 457. But the presumption arising from a recital in the record that service was made within the district cannot be overcome by mere proof that the defendant was not a resident of the state: Kuhn *v.* McMillen, 3 Dill. 372.

A RECITAL OF AN APPEARANCE MAY BE CONTROVERTED.—If a record shows an appearance by the defendant it is at least *prima facie* evidence of the fact: Whittaker *v.* Murray, 15 Ill. 293; Reber *v.* Wright, 68 Pa. St. 471; Cone *v.* Hooper, 18 Minn. 531; Tipton *v.* Mayfield, 10 La. 189; Edmonds *v.* Montgomery, 1 Ia. 143; Cassidy *v.* Leetch, 53 How. Pr. 105; Price *v.* Ward, 25 N. J. L 225; Kerr *v.* Kerr, 41 N. Y. 272; Eager *v.* Stover, 59 Mo. 87; Wilcox *v.* Cassock, 2 Mich. 165.

SERVICE OF ORIGINAL PROCESS OUT OF THE STATE.—The jurisdiction of state courts is limited by the boundary to the state, and original process issuing therefrom can have no force or effect without the state. Such process served without the state cannot give the state court jurisdiction of the person of a defendant, and a judgment *in personam* in such a case is void: Warren Man. Co. *v.* Etna Ins. Co., 2 Paine 501; Public Works *v.* Columbia College, 17 Wall. 521; Ewer *v.* Coffin, 55 Mass. 23; Price *v.* Hickok, 39 Vt. 292.

SERVICE BY PUBLICATION: AND BY COPY.—Within the limits, however, of natural justice and fundamental principles of right, a state may prescribe the mode of bringing its own citizens before its courts, and the judgments of her courts entered on proceedings which conform to the statutes in such case provided cannot be impeached in the courts of another state. Thus, if the statute of a state permits a publication of notice against defendants residing out of a state, and some reside in and some without the state, and those in the state are personally served with original process and those without the state by publication, a judgment would be void in this respect against those defendants

in the state who were personally served, but not as a personal judgment against the others: Stockwell *v.* McCracken, 109 Mass. 84; Knowles *v.* Gas and Coke Co., 19 Wall. 58; Welch *v.* Sykes, 8 Ill. 197; Gilman *v.* Lewis, 24 N. J. L. 246; De Arcy *v.* Ketchum, 11 How. 165; Hall *v.* Laming, 91 U. S. 160; Green *v.* Sarmiento, 3 Wash. 17; Christmas *v.* Russell, 5 Wall. 290; Bissill *v.* Briggs, 9 Mass. 462; Folger *v.* Ins. Co., 99 *id.* 267; Maxwell *v.* Stewart, 22 Wall. 77; Woodward *v.* Tremere, 23 Mass. 354; Reber *v.* Wright, 68 Pa. St. 471.

Although a corporation is considered a citizen of the state where it was incorporated, the statute of a state may provide for the service of original process on it, by service on an agent or officer of the corporation within the state where the suit is brought, and a judgment recovered on such a service would in that respect be binding in other states: Lafayette Ins. Co. *v.* French, 18 How. 404; s. c, 5 McLean 461; Waymouth *v.* Railroad Co., 1 McArthur 19; Moulin *v.* Ins. Co., 25 N. J. L. 57; Latimer *v.* Union Pac. R. Co., 43 Mo. 105

Effect of a voluntary appearance.—A voluntary general appearance in a suit is a waiver of all defects in the form or service of original process, and a judgment therein will be valid in any other state; and all defects of this kind would be waived by pleading the judgment in bar to an action upon the original contract or other foundation of the suit: Henderson *v.* Steinford, 105 Mass. 504; Lucas *v.* Bank, 2 Stew. 280; Shields *v.* Thomas, 18 How. 253; Hill *v.* Mendenhall, 21 Wall. 453; Church *v.* Crossman, 49 Ia. 444; Kimbal *v.* Merrick, 20 Ark. 12; Smith *v.* Ross, 7 Mo. 463; Milne *v.* Van Buskirk, 9 Ia. 558; Wright *v.* Wersinger, 13 Miss. 210; Huston *v.* Dunn, 13 Tex. 476. See also Nations *v.* Johnson, 24 How. 195; Horton *v.* Critchfield, 18 Ill. 133.

In case of foreign attachment.—If the defendant in a foreign attachment suit is not served with original process and makes no voluntary appearance, the judgment is not conclusive evidence of the debt: Ricketts *v.* Henderson, 2 Cr. C. C. 157; Phelps *v.* Holker, 1 Dall. 261; Ewer *v.* Coffin, 55 Mass. 23; Gilman *v.* Gilman, 126 *id.* 26; Jones *v.* Spencer, 15 Wis. 583; Pelton *v.* Platner, 13 Ohio 209; Arndt *v.* Arndt, 15 *id.* 33; McVicker *v.* Beedy, 31 Me. 314; Price *v.* Hekok, 39 Vt. 292; Robins *v.* Ward, 8 Johns. 86; but if the defendant voluntarily appears in the action generally to defend, the judgment will be binding on him: Maxwell *v.* Stewart, 22 Wall. 77; Mayhew *v.* Thatcher, 6 Wh. 129; if the appearance is merely for the purpose of defending the property, it has been held that this did not give the court jurisdiction of the person: Starbuck *v.* Murray, 5 Wend. 148. See also Feltus *v.* Starke, 12 La. An. 798. And if the attachment was valid in the state where the suit was instituted, a sale of property under a judgment obtained therein will pass a valid title to the property: Green *v.* Van Buskirk, 7 Wall. 139; s. c., 2 Keyes 119; s. c., 34 Barb. 457; Melhop *v.* Doane, 31 Ia. 397.

Remedies on judgments in another state.—The remedy on a judgment rendered in another state is by a suit on the judgment, and a resort to such remedies as the state where the last judgment is obtained may afford. The form of the action will of course depend upon the laws of the latter state. No court can give effect to a judgment of a court

of another state in any other way; nor can it enforce the collateral remedies prevailing in the state where the original judgment was rendered: Dimick *v.* Brooks, 21 Vt. 569; Thorn *v.* Batory, 41 Md. 593; Briggs *v.* Campbell, 19 La. 524.

INTEREST AND SATISFACTION.—The rate of interest on a judgment is governed by the law of the state where it was rendered, and not upon the law of another state where it is the basis of a new suit: Clark *v.* Pratt, 20 Ala. 470; Lewis *v.* Wilder, 4 La. An. 574; David *v.* Porter, 52 la. 254; Hudson *v.* Daily, 13 Ala. 722; but a new judgment in another state does not satisfy the original one: Bates *v.* Lyon, 7 Paige 85; nor is it a bar to another action on the original one unless it has been satisfied: Weeks *v.* Pearson, 5 N. H. 324; Tarver *v.* Rankin, 3 Fla. 210.

DECREES FOR DIVORCE.—In case of a decree of divorce, if the court had jurisdiction over the parties under the laws of the state where it was made, it will be deemed valid in other states so far as the divorce is concerned; but in respect to collateral matters, such as alimony and property, it is not always conclusive of the rights of parties in another state: Cheever *v.* Wilson, 9 Wall. 108; Kinnier *v.* Kinnier, 45 N. Y. 535; Harrison *v.* Harrison, 20 Ala. 629; Barber *v.* Root, 10 Mass. 260; Kerr *v.* Kerr, 41 N. Y. 272; Smith *v.* Smith, 79 Mass. 209; Nicholas *v.* Nicholas, 25 N. J. Eq. 60; Doughty *v.* Doughty, 27 *id.* 315; s. c., 28 *id.* 581; Platt's Appeal, 80 Pa. St. 501; People *v.* Baker, 76 N. Y. 78; Cox *v.* Cox, 19 Ohio St. 505; s. c., 20 *id.* 439; Luth *v.* Luth, 39 N. H. 20; Hoffman *v.* Hoffman, 46 N. Y. 30; Hood *v.* Hood, 93 Mass. 196; Ditson *v.* Ditson, 4 R. I. 87; Hunt *v.* Hunt, 72 N. Y. 217; Lyon *v.* Lyon, 68 Mass. 367; Burlen *v.* Shannon, 115 *id.* 438; State *v.* Armington, 25 Minn. 29; People *v.* Dawell, 25 Mich. 247; People *v.* Smith, 20 N. Y. 414; Middleworth *v.* McDowell, 49 Ind. 386.

PLEADINGS IN A SUIT ON A JUDGMENT.—The form of the action and the requirements of the declaration or petition must, as we have observed, conform to the practice of the state where the suit is brought. If the judgment or decree is conclusive between the parties in the state where it is rendered, it is, as we have seen, conclusive in other states if the court had jurisdiction. A plea therefore of *nil debet* is not a good plea to a declaration on a valid judgment of another state; the only plea which can be entered is *nul tiel* record: Maxwell *v.* Stewart, 22 Wall. 77; Mills *v.* Duryee, 7 Cr. 481; Hampton *v.* McConnel, 3 Wh. 234; Armstrong *v.* Carson, 2 Dall. 302; Jacquette *v.* Hugunon, 2 McLean 129; Lawrence *v.* Jarvis, 32 Ill. 304; Buchanan *v.* Port, 5 Ind. 264; Hensley *v.* Force, 12 Ark. 756. And the same rule applies to a judgment rendered by a court in the District of Columbia: Hughes *v.* Davis, 8 Md. 271; Duval *v.* Fearson, 18 *id.* 502.

But if the invalidity of the judgment appears upon the record, or if the defendant desires to take issue on the jurisdiction of the court to render the judgment, then the plea *nil debet* or some equivalent plea under the statutes of the state is proper, as it presents the question of jurisdiction for inquiry; and the defendant may show that the court in which the judgment was rendered had no jurisdiction of the subject-matter of the suit or of the person of the defendant: Warren Mfg. Co. *v.* Etna Ins. Co., 2

the courts or offices of the state, territory or country as aforesaid, from which they are taken.[1]

COPIES OF FOREIGN RECORDS IN CERTAIN CASES.—*Sec.* 907. It shall be lawful for any keeper or person having the custody of

Paine 501; Warren *v.* Flagg, 19 Mass. 448; Beale *v.* Berryman, 30 N. J. L. 216; Foster *v.* Glazner, 27 Ala. 391; Lawrence *v.* Jarvis, 32 Ill. 304; Starbach *v.* Murray, 5 Wend. 148; Price *v.* Ward, 25 N. J. L. 225; Shufeld *v.* Buckley, 45 Ill. 223; Warren *v.* McCarthy, 25 *id.* 95.

Such a plea must necessarily admit that the record exists as a matter of fact, and seek relief by avoiding its effect; and should therefore be formally pleaded in order that the facts upon which it is predicated may be admitted or put in issue: Hill *v.* Mendenhall, 21 Wall. 453; Miller *v.* Pennington, 2 Stew. 399; Moulin *v.* Insurance Co., 24 N. J. L. 222; Lackland *v.* Pritchett, 12 Mo. 484. A plea of payment would always be good: Hutchinson *v.* Patrick, 3 Mo. 65; so of a plea that the plaintiff has executed to the defendant a release from the judgment: Eaton *v.* Hasty, 6 Neb. 419.

[1] WHAT RECORDS MAY BE CERTIFIED AS EVIDENCE.—The language, "records and exemplification of books which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court," means the public writings recognized by the common law as invested with an official character, but which are not of the nature of judicial records or judgments, and are therefore susceptible of proof by secondary evidence. Of this character are the acts and orders of the executive officer of the state; the acts of legislative bodies; the journals of either branch of the legislature; registers kept in public offices; books which contain the official proceedings of municipal corporations; parish registers and the like: Snyder *v.* Wise, 10 Pa. St. 157. Thus, an exemplified copy of a marriage license, certified and attested by the proper public officer: King *v.* Dale, 2 Ill. 513; or of the record of a patent to hold an office: Henthorn *v.* Shepherd, 1 Blackf. 157; or of a recorded guardian's bond, unless it is a matter of record in the probate court: Carlisle *v.* Tuttle, 30 Ala. 613, may be certified under this provision.

A deed or other instrument duly recorded under the laws of a state may be thus attested by the keeper of such record with the seal of his office annexed, if there is a further certificate of the presiding justice of the court of the county or district in which such office is kept that such attestation is in due form and by the proper officer, and this certificate is further authenticated by the clerk or prothonotary of the court under his hand and seal of office, that the justice who certifies is duly commissioned and qualified; and provided further that the effect of such a record as evidence be shown in the state where it is recorded: Drummond *v.* Magruder, 9 Ct. 122; Dickerson *v.* Grissom, 4 La. An. 538; Condit *v.* Blackwell, 19 N. J. Eq. 193; Powell *v.* Knox, 16 Ala. 364; Key *v.* Vaughn, 15 *id.* 497; Kidd *v.* Manly, 28 Miss. 156; Brown *v.* Edson, 23 Vt. 435; Pennel *v.* Weyant, 2 Har. 501; Paca *v.* Dutton, 4 Mo. 371; Smith *v.* Redden, 5 Har. 321; but a secretary of

laws, judgments, orders, decrees, journals, correspondence or other public documents of any foreign government or its agents relating to the title to lands claimed by or under the United States, on the application of the head of one of the departments, the Solicitor of the Treasury, or the Commissioner of the General Land-Office, to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the Solicitor of the Treasury, who shall file them in his office and cause them to be recorded in a book to be kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence or other public document so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed by or under the United States may come into question, equally with the originals.

LITTLE & BROWN'S EDITION OF THE STATUTES TO BE EVIDENCE. *Sec.* 908. The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity, and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several states, without any further proof or authentication thereof.

The act of June 20, 1874,[1] provides that the said printed copies of the said acts of each session and of the said bound copies of the acts of each Congress shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States and of the several states therein.

The act of June 7, 1880,[2] provides: The publication herein authorized shall be taken to be *prima facie* evidence of the laws therein contained in all the courts of the United States and of

state need not certify that the attestation of articles of incorporation is in due form of law: Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208.

[1] Act of June 20, 1874, ch. 333, § 8, 18 Stat. L. 114.

[2] Act of June 7, 1880, Res. 44, 21 Stat. L. 308.

the several states and territories therein; but shall not preclude reference to, nor control in case of any discrepancy the effect of, any original act as passed by Congress; *provided*, that nothing herein contained shall be construed to change or alter any existing law.[1] By the act of January 12, 1895,[2] the pamphlet copies of the statutes and the bound copies of the acts of each Congress shall be legal evidence of the laws and treaties therein contained in all the courts of the United States and of the several states therein.

BURDEN OF PROOF OF THE DEFENDANT IN CERTAIN CASES.—*Sec.* 909. In suits or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant; *provided*, that probable cause is shown for such prosecution, to be judged of by the court.[3]

POSSESSORY ACTIONS FOR THE RECOVERY OF MINING TITLES.—*Sec.* 910. No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.[4]

[1] The second edition of the Revised Statutes is evidence, but does not control acts passed since Dec. 1, 1873: Act of March 2, 1877, ch. 82, § 4, 19 Stat. L. 268, 1 Supp. R. S. 134; Act of March 9, 1878, ch. 26, 20 Stat. L. 27, 1 Supp. R. S. 153. So of Supplement to Revised Statutes.

When the meaning of the Revised Statutes is plain the courts cannot look to the original statutes; but may do so when necessary to construe doubtful language: Bate Refrigerating Co. *v.* Sulzberger, 157 U. S. 1, citing U. S. *v.* Bowen, 100 *id.* 508. See also King *v.* McLean Asylum, 21 U. S. App. 481.

[2] Act of Jan. 12, 1895, ch. 23, § 73, 28 Stat. L. 601, etc., 2 Supp. R. S. 356.

[3] If probable cause is shown for the prosecution under this section, the burden of proof is on the claimant: Locke *v.* United States, 7 Cr. 339; The Coquittam, 57 Fed. Rep. 706. If a *prima facie* case is made out by the prosecutor and the claimant fails to produce papers or other evidence which must be in his possession or under his control, and which would determine the question, he cannot succeed: Clifton *v.* United States, 4 How. 242; The Luminary, 8 Wh. 407.

For an exposition of the term "probable cause," see The John Griffin, 15 Wall. 29; Woods *v.* United States, 16 Pet. 342. And whether probable cause has been shown is not a question of law for the court to determine: Clifton *v.* United States, *supra;* Taylor *v.* United States, 3 How. 197; Buckley *v.* United States, 4 *id.* 251; see also Cliquot's Champagne, 3 Wall. 114.

[4] See Meydenbauer *v.* Stevens, 78 Fed. Rep. 787.

CHAPTER XXVII.

PROVISIONS OF THE REVISED STATUTES ON LIMITATIONS.

The Statutes of Limitations.

§ 533. We insert here the provisions of the statutes on limitations, with notes, for convenience of reference, as follows:

CAPITAL OFFENCES.—*Sec.* 1043. No person shall be prosecuted tried or punished for treason or other capital offence, willful murder excepted, unless the indictment is found within three years next after such treason or capital offence is done or committed.

OFFENCES NOT CAPITAL.—*Sec.* 1044, as amended by the act of April 13, 1876.[1] No person shall be prosecuted tried or punished for any offence, not capital, except as provided in section 1046, unless the indictment is found or the information is instituted within three years next after such offence shall have been committed.[2]

[1] Act of April 13, 1876, ch. 56, 19 Stat. L. 32.

[2] It is not necessary to make a special plea of the statute of limitations, but the defence may be under a plea of not guilty: United States *v.* Brown, 2 Lowell 267; United States *v.* White, 5 Cr. C. C. 73; United States *v.* Cook, 17 Wall. 168. An indictment will not be quashed although it is apparent from the record that the offence was committed more than three years before the indictment was found, as the defence of the statute of limitations cannot be set up by a demurrer: United States *v.* Cook, 17 Wall. 168; United States *v.* Watkins, 3 Cr. C. C. 441; United States *v.* White, 5 *id.* 368.

The indictment may set forth the true time of the commission of the offence, and any facts which show the defendant cannot avail himself of the statute as a defence, even though the time was more than three years before the finding of the indictment. Even if the indictment does not show that the defendant fled from justice, it may be given in evidence under the general issue: *Ibid.*

The time runs from the commission of the offence to the finding of an indictment or the filing of an information on which the defendant is tried; thus where an indictment for an offence was found within three years, but a *nolle prosequi* was entered upon

FLEEING FROM JUSTICE.—*Sec.* 1045. Nothing in the two preceding sections shall extend to any person fleeing from justice.[1]

CRIMES UNDER THE REVENUE LAWS.—*Sec.* 1046. No person shall be prosecuted, tried or punished for any crime arising under the revenue laws or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime.[2]

The act of June 22, 1874,[3] provides: That no suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States shall be instituted unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall

it, and after the lapse of more than three years another indictment was found for the same offence, it was held that the second indictment could not be considered as an amendment of the first, but must be considered as the commencement of a new prosecution which was barred by the statute: United States *v.* Ballard, 3 McLean 469. This provision has no application to offences arising under the revenue laws: United States *v.* Hirsch, 100 U. S. 33. Where a pensioner made a demand upon an agent for a pension more than three years before the commencement of the prosecution for withholding it, this section was held to be a bar to the prosecution: United States *v.* Irvine, 98 U. S. 450.

[1] The term "fleeing from justice" means to leave one's home or residence or known place of abode with intent to avoid detection and punishment for some offence against the United States, and not merely to avoid process, or avoid the criminal justice of the state: United States *v.* O'Brian, 3 Dill. 381; United States *v.* White, 5 Cr. C. C. 116. A person may come within this provision who does not leave the state or district, as by secreting himself within it: *Ibid.* It is sufficient if there is a flight with the intention to avoid prosecution, whether the prosecution has been begun or not; the intent may be to avoid the justice of the state having jurisdiction over the same place and the same act: Streep *v.* U. S., 160 U. S. 128.

[2] The term "revenue laws" embraces only such statutes as have for their direct and avowed purpose the creating and securing of revenue, and not laws whose indirect operation may conduce to the fiscal wealth of the country: United States *v.* Mayo, 1 Gall. 377; United States *v.* Norton, 91 U. S. 566; United States *v.* Hirsch, 100 *id.* 33.

This section embraces a crime created by a statute relating to internal revenue: United States *v.* Dustin, 15 I. R. R. 30; United States *v.* Wright, 11 *id.* 35; *In re* Adolph Landsberg, 11 *id.* 150; McGlinchy *v.* United States, 4 Cliff. 312; Perkins *v.* United States, *Ibid.* 321. But it does not embrace crimes under the act to establish the postal money-order system: United States *v.* Norton, 91 U. S. 566.

[3] Act of June 22, 1874, ch. 391, § 22, 18 Stat. L. 190.

have accrued; *provided*, that the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation.

By the act of July 5, 1884,[1] "No person shall be prosecuted, tried or punished for any of the various offences arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offence, in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within two years in all other cases: *Provided*, That the time during which the person committing the offence is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings: *Provided, further*, That the provisions of this act shall not apply to offences committed prior to its passages: *And provided further*, That where a complaint shall be instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district: *And provided further*, That this act shall not apply to offences committed by officers of the United States."

PENALTIES AND FORFEITURES—*Sec.* 1047. No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued; *provided*, that the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property.[2]

[1] Act of July 5, 1884, ch. 225, 23 Stat. L. 122, 1 Supp. R. S. 463.

[2] The word "penalty" in this section has been held to mean the same as fine, that is, a fixed pecuniary mulct incurred by a violation of some law: *In re* Landsberg, 11 I. R. R. 150; and it applies to an action of debt to recover a penalty as well as to an information or indictment: Adams *v.* Woods, 2 Cr. 336; and to suits *in personam* and *in rem*: Hatch *v.* The Boston, 3 Fed. Rep. 807. See also Stimpson *v.* Pond, 2 Curt. 502;

PARTIES BEYOND THE REACH OF PROCESS DURING REBELLION.—*Sec.* 1048. In all cases where, during the late rebellion, any person could not, by reason of resistance to the execution of the laws of the United States, or of the interruption of the ordinary course of judicial proceedings, be served with process for the commencement of any action, civil or criminal, which had accrued against him, the time during which such person was beyond the reach of legal process shall not be taken as any part of the time limited by law for the commencement of such action.[1]

United States *v.* Brown, 2 Low. 267. But it does not apply to an action for the penalty of a bond: Raymond *v.* United States, 14 Blatch. 51.

The action of a master of a vessel to recover a penalty for refusal or neglect to deposit his papers with the consul is within the provisions of this section: Parsons *v.* Hunter, 2 Sum. 419; and for penalties and forfeitures arising under customs laws: *In re* Landsberg, 11 I. R. R. 150; but the statute will not bar a right of action secured to the United States by an act of Congress: Perkins *v.* United States, 4 Cliff. 312; McGlinchy *v.* United States, *Ibid.* 321.

[1] This section is not a statute of limitation, for it does not specify any time within which the action must be commenced, nor does it apply to actions between persons who resided in the Confederate States: Graydon *v.* Sweet, 1 Woods 418; Lockhart *v.* Horn, *Ibid.* 569. It requires all the time to be deducted from the ordinary limitation during which the suit could not be prosecuted by reason of resistance to the laws or interruption of judicial proceedings, whether before or after the passage of the act; and if the defendant was in some place within the Confederate States where the judicial tribunals were not interrupted, but were open for the prosecution of suits, and process could have been served upon the defendant, the general rule of limitation would apply: United States *v.* Wiley, 11 Wall. 508; Britton *v.* Butler, 11 Blatch. 350; Harrison *v.* Myer, 92 U. S. 115; McClung *v.* Lilliman, 3 Pet. 270; Ross *v.* Duval, 13 *id.* 45; Leffingwell *v.* Warren, 2 Black. 599.

CHAPTER XXVIII.

FEES AND COSTS.

Provisions of the Statutes Relating to Fees of Officers.

§ 534. The Revised Statutes provide for the fees of federal judicial officers, attorneys and witnesses, and for costs, as follows:

FEES TAXED AND ALLOWED.—*Sec.* 823. The following and no other compensation shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors and printers in the several states and territories, except in cases otherwise expressly provided by law.[1] But nothing herein shall be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties.[2]

[1] The fees belong to the proctors, marshals, clerks, etc., and not to the parties to the cause: The Whisper, 13 U. S. App. 394.

[2] DOCKET FEES.—This provision was designed to prevent a practice in the federal courts, prevailing for some time, of allowing fees in the discretion of the courts. It was intended to remedy a great evil, and is vigorously enforced to carry out the intention: Simpson *v.* Brooks, 3 Blatch. 456.

Every item of fees of officers of the court must be specified in the fee bill, and the court cannot go outside the provision to make any allowance of costs on any considerations of justice. And the province of the taxing officer is limited to a comparison of the charges made with the provisions of the statute; and when the charge is found not to be within the enumerated fees of the statute, it is rejected; Dedekam *v.* Vose, 3 Blatch. 153; Lyell *v.* Miller, 6 McLean 422; United States *v.* Package, 16 Law Rep. 284; United States *v.* Smith, N. & M. 184.

Costs for printing testimony will not be allowed, as no provision is made therefor: Spaulding *v.* Tucker, 2 Saw. 50; 4 Fish 633; Hussey *v.*

The act of May 28, 1896,[1] provides that on and after July 1, 1896, "all fees and emoluments[2] authorized by law to be paid to United States district attorneys and United States marshals shall be charged as heretofore, and shall be collected, as far as possible, and paid to the clerk of the court having jurisdiction, and by him covered into the Treasury of the United States and said officers shall be paid for their official services which, in the case of district attorneys, shall include services in the circuit courts of appeals of their respective circuits wherever sitting, salaries and compensation hereinafter provided and not otherwise: *Provided*, That this section shall not be construed to require or authorize fees to be charged against or collected from the United States except as provided by sections 11 and 13 of this act relating to field deputies and their payments." For a fuller discussion of this act, see Chapter III. *supra*.[3]

FEES OF ATTORNEYS, SOLICITORS AND PROCTORS.— *Sec.* 824. On a trial before a jury in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars; *provided*, that in cases of admiralty and maritime jurisdiction, where the libellant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars.[4]

In cases at law, when judgment is rendered without a jury, ten dollars.

In cases at law, when the cause is discontinued, five dollars.

Bradley, 5 Blatch. 210; Troy I. & N. Fac. *v.* Corning, 7 *id.* 16.

But the statute does not prohibit the allowance of such disbursements as are made necessary by the order of the court: Dennis *v.* Eddy, 12 Blatch. 195; Brooks *v.* Byam, 2 Story 553. And if a rule of court requires briefs to be printed, the expense thereof may be taxed: Neff *v.* Pennoyer, 3 Saw. 335. Solicitors' fees, in general, see Kaempfer *v.* Taylor, 78 Fed. Rep. 795. Proctors' fees, in general, see The State of Missouri, 76 Fed. Rep. 376.

[1] Act of May 28, 1896, ch. 252, § 6, Stat. 1895-96, 179.

[2] The expenses of an outside keeper employed by the marshal to take care of the property attached are not "fees and emoluments" to be collected and accounted for under this section, nor can any security therefor be required by the department of justice: The Vandercook, 77 Fed. Rep. 865.

[3] By § 24 its provisions do not apply to Alaska, nor do §§ 6, 8 and 15 apply to the office of the United States district attorney and his assistants for the southern district of New York or for the District of Columbia. See *ante* § 28.

[4] The attorney's docket fee cannot be taxed in favor of a party or an attorney who conducts his own cause: Gorse *v.* Parker, 36 Fed. Rep. 840.

For *scire facias* and other proceedings on recognizances, five dollars.

For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents.[1]

For services rendered in cases removed from a district to a circuit court by writ of error or appeal, five dollars.

For examination by a district attorney, before a judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed.

For each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term.

For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning.[2]

When an indictment for crime is tried before a jury and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars.[3]

[1] As to what constitutes a deposition within the meaning of this section, see Indianapolis Water Co. *v.* Amer. Straw Board Co., 65 Fed. Rep. 534.

[2] Mileage or travel fees are allowed to a district attorney as a disbursement or commutation of traveling expenses, irrespective of the amount of compensation for services to which he is limited by law. *Per diem* allowances to him for attendance and charges for special services directed by the Attorney-General are compensation for services and in law form part of the gross sum therefor, which may not be exceeded: U. S. *v.* Smith, 158 U. S. 346. He cannot be allowed a *per diem* compensation for attending court elsewhere than at his place of abode on Sundays or legal holidays as the proviso in the appropriation act of March 3, 1887, ch. 362, prohibits such allowance or payment, and to that extent amends this section: U. S. *v.* Perry, 4 U. S. App. 386.

[3] Nothing can be taxed as incident to the judgment against the failing party for the services of attorneys, solicitors or proctors, except the costs and fees enumerated in the statute: The Baltimore, 8 Wall. 377; The Liverpool Packet, 2 Sprague 37; Derry *v.* Hersey, 21 Law Rep. 473; Cauter *v.* American Ins. Co., 3 Pet. 307.

The act of June 20, 1874,[1] provides: That no civil officer of the government shall hereafter receive any compensation or perquisites, directly or indirectly, from the treasury or property of the United States beyond his salary or compensation allowed by law: *Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees.

The act of August 18, 1894,[2] provides: That hereafter the

Twenty dollars is the highest fee that can be allowed to an attorney in a cause, and it can be allowed but once: Troy I. & N. Fac. *v.* Corning, 7 Blatch. 16; Dedekam *v.* Vose, 3 *id.* 153; Goodyear *v.* Osgood, 13 O. G. 325. It will be allowed whenever the court gives costs: John Shillito Co. *v.* McClung, 31 U. S. App. 70.

If a cause has been removed from a state court, no more fees can be allowed than those provided by the statute: Clare *v.* National Cit. Bank, 14 Blatch. 445.

In cases at law, if there is a waiver of a jury and a trial by the court, only ten dollars can be taxed as costs. But if a libellant discontinues his suit after a witness has been sworn, a docket fee of twenty dollars will be allowed: Jones *v.* Schell, 8 Blatch. 79; The Bay City, 3 Fed. Rep. 47. So in case a cause is dismissed because an appellant gave no security for costs, the fee of twenty dollars will be allowed: Hayford *v.* Griffith, 3 Blatch. 79. So where a preliminary injunction is refused, if the plaintiff dismiss the bill the twenty dollar docket fee will be allowed: Louisville & N. R. Co. *v.* Merch. Compress & Storage Co., 50 Fed. Rep. 449. But where the court orders a cause to be discontinued, without prejudice, and provides that certain depositions may be used by defendant in any suit brought by plaintiff on same cause of action, the discontinuance is not a final hearing and the fee will not be taxed: Kaempfer *v.* Taylor, 78 Fed. Rep. 795.

The district attorney may be allowed double fees in certain cases. See Weed *v.* U. S., 82 Fed. Rep. 414.

The statute provides a fee for each deposition of two dollars and fifty cents. This does not embrace affidavits. A deposition is evidence given by a witness under interrogatories, oral or written, and the evidence is usually written down by an official person, while an affidavit is a voluntary act on the part of the person making the oath, and may be, and generally is, taken without the cognizance of the person against whom it is to be used. It is *ex parte* and not included in the statute under consideration, providing for a fee for depositions: Stimpson *v.* Brooks, 3 Blatch. 456; Beckwith *v.* Easton, 4 Ben. 357. See also as to district attorneys' fees: Colman *v.* U. S., 24 U. S. App. 632; U. S. *v.* Stanton, 35 *id.* 799; U. S. *v.* Winston, 73 Fed. Rep. 149; Ruhm *v.* U. S., 66 *id* 531; Weed *v.* U. S., 65 *id.* 399; Baxter *v.* U. S., 51 *id.* 671; Weed *v.* U. S., 82 *id.* 414.

[1] Act of June 20, 1874, ch. 328, § 3, 18 Stat L. 85, 1 Supp. R. S. 18.

[2] Act of August 18, 1894, ch. 301, par. 20, 28 Stat. L. 372, etc, 2 Supp. R. S. 258.

United States district attorney shall be allowed one mileage actually traveled to and from the place of hearing for his attendance in person, or by his assistant, before a United States commissioner or other committing magistrate, in each case, and no more.

By par. 21 no mileage is to be allowed to the marshal or other officer who violates the provisions of the statute regulating arrest.

The act of May 28, 1896,[1] provides: That the assistant district attorneys shall be paid such salary as the Attorney-General may from time to time determine as to each, which shall in no case exceed two thousand five hundred dollars per annum: *Provided*, That the necessary expenses for lodging and subsistence actually paid, not exceeding four dollars per day and actual and necessary traveling expenses of the district attorney and his assistants, while absent from their respective official residences and necessarily employed in going to, returning from and attending before any United States court, commissioner, or other committing magistrate, and while otherwise necessarily absent from their respective official residences on official business, shall be allowed and paid in the manner hereinafter provided.

By § 7 the salaries of district attorneys are regulated. See Chapter III. *supra*.

FEES IN REVENUE AND OTHER CASES.—*Sec.* 825. There shall be taxed and paid to every district attorney two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding.[2]

[1] Act of May 28, 1896, ch. 252, § 8.

[2] This section has been held to apply to cases arising under the internal revenue laws as well as to those arising under the common revenue laws: United States *v.* 500 Barrels, 2 Bond 7.

The "two per centum" is in the nature of a contingent fee dependent upon the collection of the money, and if the contingency does not occur, the right to the per centum does not attach: The Pacific, Deady 192. The per centum cannot be taxed in the judgment against the defendant, as the district attorney is only entitled to it upon "moneys collected or realized:" King *v.* United States, 99 U. S. 229.

Although a seizure in one district leads to a discovery of fraud in another district, and a compromise of the whole matter, the district attorney is not entitled to the per centum

FEES OF DISTRICT ATTORNEY FOR DEFENCE OF REVENUE OFFICERS.—*Sec.* 827. When a district attorney appears by direction of the Secretary or Solicitor of the Treasury, on behalf of any officer of the revenue in any suit against such officer, for any act done by him, or for the recovery of any money received by him and paid into the treasury in the performance of his official duty, he shall receive such compensation as may be certified to be proper by the court in which the suit is brought, and approved by the Secretary of the Treasury.[1]

CLERK'S FEES.[2]—*Sec.* 828. For issuing and entering every process, commission, summons, capias, execution, warrant, attachment, or other writ except a writ of venire, or a summons or subpœna for a witness, one dollar.

For issuing a writ of summons or subpœna, twenty-five cents.

For filing and entering every declaration, plea or other paper, ten cents.

For administering an oath or affirmation, except to a juror, ten cents.

For taking an acknowledgment, twenty-five cents.

For taking and certifying depositions to file, twenty cents for each folio of one hundred words.

For a copy of such depositions furnished to a party on request, ten cents a folio.

For entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond, or making any record, certificate, return or report, for each folio, fifteen cents.

For a copy of any entry or record, or of any paper on file, for each folio, ten cents.

For making dockets and indexes, issuing venire, taxing costs and all other services, on the trial or argument of a cause where issue is joined and testimony given, three dollars.

For making dockets and indexes, taxing costs and all other

on the whole amount received on the compromise, but only on the amount received on the compromise of the seizure in his own district: United States *v.* 500 Barrels, 2 Bond 7.

If the district attorney is unsuccessful, still he is entitled to his ordinary statute fee: King *v.* United States, 99 U. S. 229.

[1] See § 4646.

[2] For the fees of the clerk of the Supreme Court, see Gen. Rule 24, par. 7.

services, in a cause where issue is joined, but no testimony is given, two dollars.

For making dockets and indexes, taxing costs and other services, in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar.

For making dockets and taxing costs, in cases removed by writ of error or appeal, one dollar.

For affixing the seal of the court to any instrument, when required, twenty cents.[1]

For every search for any particular mortgage, judgment or other lien, fifteen cents.

For searching the records of the court for judgments, decrees or other instruments constituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made.

For receiving, keeping and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept and paid.

For traveling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held, five cents a mile for going and five cents for returning, and five dollars a day for his attendance on the court while actually in session.[2]

All books in the offices of the clerks of the circuit and district courts, containing the docket or minute of the judgments or decrees thereof, shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fees or charge therefor.[3]

[1] This applies to instruments not specifically provided for in previous provisions: U. S. *v.* Clough, 6 U. S. App. 377.

[2] The court is "actually in session" when pursuant to an order adjourning the court to a certain day, the officers are present on that day and by order of the judge (though not present in person) adjourn the court to another day: U. S. *v.* Pitman, 147 U. S. 669-671; and see U. S. *v.* Coggeswall, 5 U. S. App. 496.

[3] The clerk may charge a fee where the cause is continued on account of the absence of a defendant: *Ex parte* Lee, 4 Ct. Cl. 197; and he is entitled to a commission upon the proceeds of property sold upon an interlocutory order and paid into court by the marshal: The Avery, 2 Gall. 308; *Ex parte* Prescott, *Ibid.* 146. But a

MARSHALS' FEES.—*Sec.* 829. For service of any warrant, attachment, summons, capias or other writ, except execution, venire or a summons or subpœna for a witness, two dollars for each person on whom service is made.

For the keeping of personal property attached on mesne process such compensation as the court, on petition setting forth the facts under oath, may allow.

For serving venires and summoning every twelve men as grand or petit jurors, four dollars, or thirty-three and one-third cents each. In states where, by the laws thereof, jurors are drawn by lot, by constables or other officers of corporate places, the marshal shall receive for each jury two dollars for the use of the officers employed in drawing and summoning the jurors and returning each venire, and two dollars for his own services in distributing the venires. But the fees for distributing and serving venires, drawing and summoning jurors by township officers, including the mileage chargeable by the marshal for each service, shall not at any court exceed fifty dollars.

For holding a court of inquiry or other proceedings before a jury, including the summoning of a jury, five dollars.

fund, although the subject of a decree of the court, does not entitle the clerk to a commission thereon, unless it is paid into court: *Ex parte* Plitt, 2 Wall. Jr. 453. To entitle the clerk to commissions on money received, kept and paid out, it is not sufficient that it be paid, under an order or agreement, to the person who is entitled to receive it. Such a case would not be within the provisions of the statute: *In re* Goodrich, 4 Dill. 230; Upton *v.* Triblecock, *Ibid.* 232. But if a marshal pays the proceeds of a sale on execution into court, the clerk is entitled to a commission for the money so received: Kitchen *v.* Woodfin, 1 Hughes 340; *In re* Goodrich, 4 Dill. 230; The Avery, 2 Gall. 308; *Ex parte* Prescott, *Ibid.* 146. As to the right to inspect records, see *In re* McLean, 9 Cent. L. J. 425.

When a clerk performs a service in obedience to an order of the court, he is as much entitled to compensation as if he were able to put his finger on a particular clause of the statute authorizing compensation for such services: U. S. *v.* Converse, 24 U. S. App. 90. For fees of clerks of the circuit court of appeals, see U. S. *v.* Morton, *Ibid.* 531. Fees of the clerks of the Supreme Court of the United States and of the District of Columbia, see Act of March 3, 1883, ch. 143, par. 9, 22 Stat. L. 603, 1 Supp. R. S. 421. For clerks' fees in general, see U. S. *v.* Jones, 147 U. S. 672; U. S. *v.* King, *Ibid.* 676; U. S. *v.* Payne, *Ibid.* 687; U. S. *v.* McCandless, *Ibid.* 692; U. S. *v.* Taylor, *Ibid.* 695; U. S. *v.* Kurtz, 164 *id.* 49; U. S. *v.* Van Duzee, 10 U. S. App. 395; U. S. *v.* Converse, 24 *id.* 89; Pa. Co. for Ins. on Lives, etc. *v.* Walter, 30 *id.* 188; U. S. *v.* Fitch, 37 *id.* 103; U. S. *v.* Wolters, 51 Fed. Rep. 896.

For serving a writ of subpœna on a witness, fifty cents; and no further compensation shall be allowed for any copy, summons or notice for a witness.

For serving a writ of possession, partition, execution or any final process, the same mileage as is allowed for the service of any other writ, and for making the service, seizing or levying on property, advertising and disposing of the same by sale, set-off or otherwise according to law receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the states, respectively, in which the service is rendered.

For each bail-bond, fifty cents.

For summoning appraisers, fifty cents each.

For executing a deed prepared by a party or his attorney, one dollar.

For drawing and executing a deed, five dollars.

For copies of writs or papers furnished at the request of any party, ten cents a folio.

For every proclamation in admiralty, thirty cents.

For serving an attachment *in rem* or a libel in admiralty, two dollars.

For the necessary expenses of keeping boats, vessels or other property attached or libelled in admiralty, not exceeding two dollars and fifty cents a day.

When the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars; *provided*, that when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof.[1]

For sale of vessels or other property under process in admiralty, or under the order of a court of admiralty, and for receiving and paying over the money, two and one-half per centum on any sum under five hundred dollars, and one and one-quarter per centum on the excess of any sum over five hundred dollars.

[1] See Chapman Derrick & Wrecking Co., *v.* The Isabel, 79 Fed. Rep. 103.

For disbursing money to jurors and witnesses, and for other expenses, two per centum.[1]

For expenses while employed in endeavoring to arrest, under process, any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars a day, in addition to his compensation for service and travel.[2]

For every commitment or discharge of a prisoner, fifty cents.

For transporting criminals, ten cents a mile for himself and for each prisoner and necessary guard; except in the case provided for in the next paragraph.

For transporting criminals convicted of a crime in any district or territory where there is no penitentiary available for the confinement of convicts of the United States, to a prison in another district or territory designated by the Attorney-General, the reasonable actual expense of transportation of the criminals, the marshal and the guards, and the necessary subsistence and hire.[3]

For attending the circuit and district courts, when both are in session, or either of them when only one is in session, and for bringing in and committing prisoners and witnesses during the term, five dollars a day.[4]

For attending examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crime, and witnesses, two dollars a day; and for each deputy not exceeding two, necessarily attending, two dollars a day.

For traveling from his residence to the place of holding court, to attend a term thereof, ten cents a mile for going only.

For travel, in going only, to serve any process, warrant, attach-

[1] By "other expenses" are meant expenses of the same nature; a marshal may not collect commissions of disbursements for the maintenance of a penitentiary under Rev. Stat. § 1892: U. S. *v.* Baird, 150 U. S. 54.

[2] See Nixon *v.* U. S., 82 Fed. Rep. 23. When a retiring marshal relinquishes to his successor the right to expenses incurred in trying to arrest offenders against the United States, these fees may be allowed in the accounts of the incoming marshal: U. S. *v.* Fletcher, 147 U. S. 664.

[3] Where United States prisoners are transported by the marshal, his actual expenses, including transportation and subsistence, hire, transportation and subsistence of guards, and the transportation and subsistence of the convict or convicts, shall be paid, on the approval of the Attorney General out of the judiciary fund: Act of March 3, 1891, ch. 529, § 5, 26 Stat. L. 839, 1 Supp. R. S. 909.

[4] The court is in session when by its order it is open for business: McMullen *v.* U. S., 146 U. S. 360.

ment or other writ, including writs of subpœna in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others. But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpœna as convenience in serving the same will permit.[1]

In all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath, to the satisfaction of the court.[2]

[1] A marshal cannot charge under this section for taking a prisoner under sentence to the place of confinement: U. S. *v.* Tanner, 147 U. S. 661.

[2] A marshal is entitled to two dollars for the service of a venire on a state officer, where jurors are required to be drawn by such officer, but not to any mileage in serving the same: United States *v.* Smith, 1 W. & M. 184.

Fees on execution and other process.—Fees on execution and other process are regulated by the laws of the state, prescribing the fees of sheriffs for similar services. No further allowance than two dollars and fifty cents a day can be made for keeping property: The Circassian, 6 Ben. 512; The Hibernian, 1 Sprague 78; Bottomley *v.* United States, 1 Story 153. The sum of two dollars and fifty cents is not allowed unless it is reasonable, and only the actual and reasonable expenses of keeping and taking care of property actually in the possession of the marshal will be allowed: United States *v.* 500 Barrels, 1 Ben. 72. And the claim must be established by vouchers or otherwise to the satisfaction of the court: The Free Trader, 1 Brown 72; The Phebe, 1 Ware 354. He is also entitled to charge for expenses of a deputy employed in making an arrest, not exceeding two dollars and fifty cents per day: United States *v.* Harker, 3 Saw. 337.

Marshals' commissions.—If the claim or debt in a case in admiralty is settled after an attachment or libel of property without a sale, a commission is allowed the marshal of one and one-half per cent.; if there is a sale, the commission thereon goes to the marshal to whom the process or order for a sale belongs for execution and who makes the sale: The Russia, 5 Ben. 84; The City of Washington, 13 Blatch. 410. But the marshal is not entitled to any commissions if the suit is settled before any claimant appears: The Russia, 5 Ben. 84; The Norma, New 533.

Fees in other cases.—A marshal is entitled to a fee for commitment of a person, whether it be on the final judgment or the order of the

MARSHAL'S FEES IN PARTICULAR CASES.—*Sec.* 830. There shall be paid to the marshal his fees for services rendered for the United States, for summoning jurors and witnesses in behalf of the United States, and in behalf of any prisoner to be tried for a capital offence, for the maintenance of prisoners of the United States confined in jail for any criminal offence; also for his reasonable actual expense for the transportation of criminals, and of the marshal and guards, to prisons designated by the Attorney-General, and for hire and subsistence in that behalf, as hereinbefore provided; also his fees for the commitment or discharge of prisoners; his expenses necessarily incurred for fuel, lights and other contingencies that may accrue in holding the courts within his district, and providing the books necessary to record the proceedings thereof; *provided*, that he shall not incur or be allowed an expense of more than twenty dollars in any one year for furniture, or fifty dollars for rent of a building and making improvements thereon, without first submitting a statement and estimates to the Attorney-General and getting his instructions in the premises.[1]

court, and whether a party to the case or a witness: *Ex parte* Virgel Paris, 3 W. & M. 227; but not to the fee allowed on the discharge of a prisoner from custody, where he is merely brought into court to testify or to be tried: *Ibid.*

If a marshal serves a subpœna on a witness out of the state, he cannot charge mileage for more than one hundred miles, although he may have traveled a greater distance: Parker *v.* Bigler, 1 Fish. 285.

For marshals' fees in general, see U. S. *v.* Harmon, 147 U. S. 268; U. S. *v.* McMahon, 164 *id.* 81; Fitzsimmons *v.* U. S., 13 U. S. App. 166; U. S. *v.* Carroll, 15 *id.* 269; Campbell *v.* U. S., 27 *id.* 666; Dexter, etc., Co. *v.* Sayward, 78 Fed. Rep. 275; Dill *v.* U. S., *Ibid.* 614; Donahower *v.* U. S., 77 *Ibid.* 153; Saunders *v.* U. S., 73 *id.* 782; Hitch *v.* U. S., 66 *id.* 937; The Scottish Dale, 65 *id.* 810; Kinney *v.* U. S., 60 *id.* 883; U. S. *v.* Hillyer, 58 *id.* 678; U. S. *v.* Aldrich, *Ibid.* 688. The salaries of marshals are established by § 9 of the act of May 28, 1896, ch. 252. See Chapter III, *supra.*

[1] The marshal is entitled to an allowance for maintaining persons committed to his custody, pending a writ of *habeas corpus:* Case of Runaways, 4 Cr. C. C. 489; for money expended for rent of an office for the clerk: United States *v.* Cogswell, 3 Sum. 204; and for interest on items which are properly chargeable against the government from the time of their rejection; but he is not authorized to charge for superintending a state prison where prisoners are kept for the United States; or for personal expenses incurred by him for the purpose of establishing and settling his accounts against the government: United States *v.* Cogswell, 3 Sum. 204; United States *v.* Smith, 1 W. & M. 184.

The act of May 28, 1896,[1] provides: That when any of the marshal's office deputies is engaged in the service or attempted service of any writ, process, subpœna or other order of the court, or when necessarily absent from the place of his regular employment on official business, he shall be allowed his actual traveling expenses only, and his necessary and actual expenses for lodging and subsistence, not to exceed two dollars per day, and the necessary actual expenses in transporting prisoners, including necessary guard hire, and he shall make and render accounts thereof as hereinafter provided.

By section 11 the marshal's field deputies shall be allowed their actual necessary expenses, not exceeding two dollars a day, while endeavoring to arrest, under process, a person charged with or convicted of crime: *Provided*, That a field deputy may elect to receive actual expenses on any trip in lieu of mileage: *Provided*, That in special cases, where in his judgment justice requires, the Attorney-General may make an additional allowance, not, however, in any case to make the aggregate annual compensation of any field deputy in excess of twenty-five hundred dollars, nor more than three-fourths of the gross fees earned by such field deputy.

By section 12 the marshal, when attending court at any place other than his official residence, and when engaged in the service or attempted service of any process, writ or subpœna, and when otherwise necessarily absent from his official residence on official business, shall be allowed his necessary expenses for lodging and subsistence, not exceeding four dollars a day and his actual necessary traveling expenses. He shall also be allowed the actual necessary expenses in transporting prisoners, including necessary guard hire.

NO PER DIEM CAN BE ALLOWED TO OFFICERS.—*Sec.* 831. No per diem or other allowance shall be made to any district attorney, clerk of a circuit court, clerk of a district court, marshal or deputy marshal, for attendance at rule days of a circuit or district court; and when the circuit and district courts sit at the same time no greater per diem or other allowance shall be made to any such officer than for an attendance on one court.

For a particular consideration of the duties of a marshal, see *ante*, § 20 *et seq.*

[1] Act of May 28, 1896, ch. 252, § 10.

NO MILEAGE CAN BE ALLOWED EXCEPT FOR ACTUAL TRAVEL.—*Sec.* 832. The marshal of the Supreme Court of the United States shall be entitled to receive for the service of any warrant, attachment, summons, capias or other writ, except execution, venire or a summons or subpœna for a witness, one dollar for each person on whom such service may be made. His fees for all other services shall be the same as are herein allowed to other marshals; but he shall pay into the Treasury of the United States all fees received by him, and render a true account thereof at the close of each term to the Attorney-General.

The act of February 22, 1875,[1] provides: That the proviso in the sixth paragraph of the act entitled "An act making appropriations for the support of the army for the fiscal year ending June 30, 1875, and for other purposes," approved June 16, 1874, shall not be construed to apply or to have applied to attorneys, marshals, or clerks of courts of the United States, their assistants or deputies. And all accounts of said attorneys, marshals and clerks, for mileage and for expenses incurred subsequent to the 1st day of July, 1874, and prior to the 1st day of January, 1875, shall and may be audited, allowed and paid at the Treasury Department of the United States in the same manner as if said act had not been passed. And from and after the 1st day of January, 1875, no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law.

The act of March 3, 1893,[2] provides: That hereafter no marshal or deputy marshal shall be allowed more than one mileage for each mile actually and necessarily traveled, irrespective of the number of writs he may execute in making such travel; nor shall any marshal or deputy marshal be allowed any additional mileage incident to the execution or return of any writ of arrest, commitment or removal other than the ten cents a mile now allowed by law for each deputy, prisoner and guard, and no mileage shall be allowed upon any writ not executed.[3]

[1] Act of Feb. 22, 1875, ch. 95, § 7, 18 Stat. L. 334.

[2] Act of March 3, 1893, ch. 208, par. 18, 27 Stat. L. 572, etc., 2 Supp. R. S. 123.

[3] This provision is repeated in the act of Aug. 18, 1894, ch. 301, par. 19, 28 Stat. L. 372, etc., 2 Supp. R. S. 258. The act of March 3, 1893, which

SEMI-ANNUAL RETURNS OF FEES TO BE MADE.—*Sec.* 833. Every district attorney, clerk of a district court, clerk of a circuit court and marshal, shall on the first days of January and July in each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk-hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act; and every marshal shall state separately therein the fees and emoluments received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive. Said returns shall be verified by the oath of the officer making them.[1]

The act of March 2, 1895,[2] provides: That it shall be unlawful for any clerk of any court of the United States to include in his emolument account or return any fee or fees not actually earned and due at the time such account or return is required by law to be made, and no fees not actually earned shall be allowed in any such account.

WHAT TO BE INCLUDED IN THE SEMI-ANNUAL RETURN OF DISTRICT ATTORNEYS AND MARSHALS—*Sec.* 834. The preceding section shall not apply to the fees and compensation allowed to district attorneys by sections 825 and 827. All other fees,

deprives a marshal of mileage for not taking a person whom he has arrested before the nearest magistrate does not deprive him of fees and mileage for transporting such person to jail after conviction: Donahower *v.* U. S., 77 Fed. Rep. 153.

[1] See § 3085. By the acts of July 31, 1894, ch. 174, par. 16, 28 Stat. L. 162, 2 Supp. R. S. 212, and March 2, 1895, ch. 177, par. 21, 28 Stat. L. 764, 2 Supp. R. S. 417, the clerks of circuit courts of appeals are to make returns of fees. The clerk of a district court of a territory is bound to account to the United States for fees received by him from private parties in civil actions and from the territory on account of territorial business; but not for sums received for his services in naturalization proceedings: U. S. *v.* McMillan, 165 U. S. 504.

[2] Act of March 2, 1895, ch. 189, par. 12, 28 Stat. L. 910, etc., 2 Supp. R. S. 432.

charges and emoluments to which a district attorney or a marshal may be entitled by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court or any judge thereof, shall be included in the semi-annual return required of said officers by the preceding section.[1]

COMPENSATION OF DISTRICT ATTORNEY—*Sec.* 835. No district attorney shall be allowed by the Attorney-General to retain of the fees and emoluments of his office which he is required to include in his semi-annual return, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the Treasury Department, a sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year.[2]

SUM TO BE PAID DISTRICT ATTORNEY OF SOUTHERN NEW YORK FOR OFFICE EXPENSES.—*Sec.* 836. There shall be paid to the district attorney for the southern district of New York, in addition to his salary, at the rate of six thousand dollars a year, such sum as shall be necessary, together with the costs and fees allowed him by law, to pay such amount as may be fixed by the Attorney-General for the proper expenses of his office. But nothing in this or the preceding section shall forbid the allowance of additional compensation for services in prize causes, as provided in title "Prize."

FEES OF DISTRICT ATTORNEYS AND MARSHALS IN OREGON AND NEVADA.—*Sec.* 837. The district attorneys and marshals for the districts of Oregon and Nevada shall be entitled to receive, for the like services, double the fees hereinbefore provided; but neither of them shall be allowed to retain of such fees any sum

[1] Fees of district attorneys for defending *habeas corpus* proceedings brought by detained Chinese immigrants should be included in returns: Kilborn *v.* U. S., 163 U. S. 342.

[2] The compensation of the district attorney is virtually a salary, where his fees are in excess of $6,000; and the statute forbids any allowance for extra services: The Anna, Blatch. Pr. Cas. 337; United States *v.* Ingersoll, Crabbe 135. This section has been virtually superseded by § 7 of the act of May 28, 1896, ch. 252. See *ante*, Chapter III.

exceeding the aggregate compensation of such officer as hereinbefore provided.[1]

PROSECUTION FOR FRAUDS ON THE REVENUE.—*Sec.* 838, as amended by the act of February 27, 1877.[2] It shall be the duty of every district attorney to whom any collector of customs or of internal revenue shall report, according to law, any case in which any fine, penalty or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties and forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue, for their direction. And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of;[3] *provided*, that the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment.[4]

[1] For the fees of marshals, etc., in New Mexico and Arizona, see the acts of Aug. 7, 1882, ch. 436, 22 Stat. L. 344, 1 Supp. R. S. 383, and July 2, 1890, ch. 650, 26 Stat. L. 212, 1 Supp. R. S. 764. In Wyoming, see act of July 10, 1890, ch. 664, § 16, 26 Stat. L. 222, etc., 1 Supp. R. S. 771. In North Dakota, see act of Feb. 4, 1895, ch. 55, § 2, 28 Stat. L. 642, 2 Supp. R. S. 369. In Utah, see act of June 23, 1874, ch. 469, § 7, 18 Stat. L. 253, 1 Supp. R. S. 51. In Montana, see Weed *v.* U. S., 82 Fed. Rep. 414.

[2] Act of Feb. 27, 1877, ch. 69, § 1, 19 Stat. L. 240. See also act of June 22, 1874, ch. 391, § 15, 1 Supp. R. S. 34.

[3] A district attorney cannot maintain an action for expenses and services rendered until the Secretary of the Treasury determines the amount he deems just and reasonable: U. S. *v.* Bashaw, 152 U. S. 436.

[4] By the act of March 3, 1893, ch. 208, par. 19, 27 Stat. L. 572, etc., 2 Supp. R. S. 123, the fees of United States commissioners, marshals or clerks in internal revenue cases are not to be paid from appropriations, unless collected from the defendant or upon sworn complaint. This provision is repeated in par. 21 of the act of Aug. 18, 1894, ch. 301, 28 Stat. L. 372, etc., 2 Supp. R. S. 258.

COMPENSATION RETAINED BY THE CLERK.—*Sec.* 839. No clerk of a district court or clerk of a circuit court shall be allowed by the Attorney-General, except as provided in the next section and in section 842, to retain of the fees and emoluments of his office, or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk or for any such circuit clerk, or exceeding that rate for any time less than a year.

The act of November 3, 1893,[1] provides that in all cases where the clerk of the United States court for the Indian Territory is authorized or required to perform duties other than those performed by the clerks of the district and circuit courts of the United States he shall be entitled to receive and retain for his own use and benefit such fees as may be allowed by law for such services.[2]

CLERKS IN CALIFORNIA, OREGON AND NEVADA, FEES.—*Sec.* 840. The clerks of the several circuit and district courts in California, Oregon and Nevada shall be entitled to charge and receive double the fees hereinbefore allowed to clerks, and shall be allowed respectively by the Attorney-General to retain of the fees so received by them for their personal compensation over and above the necessery expenses of their offices, including the salaries of deputy clerks and necessary clerk-hire, to be audited by the proper accounting officers of the Treasury Department, any sum not exceeding seven thousand dollars a year, nor exceeding that rate for any time less than a year; *provided*, that whenever in either of the said districts the same person holds the office of clerk of both the circuit and district courts, he shall be allowed by the Attorney-General to retain for his personal compensation, as aforesaid, only such sum as is herein allowed to be retained by a person holding the office of clerk of only one of the said courts.

[1] Act of Nov. 3, 1893, ch. 16, 28 Stat. L. 9, 2 Supp. R. S. 155.

[2] See also the act of March 1, 1895, ch. 145, § 3, 28 Stat. L. 693, etc., 2 Supp. R. S. 394.

COMPENSATION OF MARSHAL.—*Sec.* 841. No marshal shall be allowed by the Attorney-General, except as provided in the next section, to retain of the fees and emoluments which he is required to include in his semi-annual return, as aforesaid, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the Treasury Department and a proper allowance to his deputies, any sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year. The allowance to any deputy shall in no case exceed three-fourths of the fees and emoluments received or payable for the services rendered by him, and may be reduced below that rate by the Attorney-General whenever the returns show such rate to be unreasonable.[1]

ADDITIONAL COMPENSATION IN PRIZE CAUSES.—*Sec.* 842. Clerks and marshals may be allowed to retain, for all official services in prize causes, an additional compensation not exceeding in amount one-half of the maximum compensation allowed to them respectively by the three preceding sections.

ALLOWANCE FOR EACH YEAR MADE FROM THE FEES.—*Sec.* 843. The allowances for personal compensation of district attorneys, clerks and marshals, for each calendar year, shall be made from the fees and emoluments of that year, and not otherwise.

PAYMENT OF SURPLUS INTO THE TREASURY.—*Sec.* 844. Every district attorney, clerk and marshal shall, at the time of making his half-yearly return to the Attorney-General, pay into the treasury, or deposit to the credit of the Treasurer as he may be directed by the Attorney-General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him.

AUDITING ACCOUNTS OF DISTRICT ATTORNEYS; DEPARTMENT OF JUSTICE.—*Sec.* 845. In every case where the return of a district attorney, clerk or marshal, shows that a surplus may exist, the Attorney-General shall cause such returns to be carefully examined, and the accounts of disbursements to be regularly audited by

[1] A deputy marshal is not an officer of the United States and cannot maintain a suit against it for services rendered: Powell *v.* U. S., 60 Fed. Rep. 687. For salaries of marshals under the act of May 28, 1896, see *ante*, Chapter III.

the proper officer of his department, and an account to be opened with such officer in proper books to be provided for that purpose.

ACCOUNTS OF DISTRICT ATTORNEYS; CERTIFIED BY DISTRICT JUDGE.—*Sec.* 846. The accounts of district attorneys, clerks, marshals and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts;[1] *provided*, that no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs.[2]

As amended by the act of February 18, 1875,[3] That where the ministerial officers of the United States have or shall incur extraordinary expenses in executing the laws thereof, the payment of which is not specially provided for, the President of the United States is authorized to allow the payment thereof under the special taxation of the district or circuit court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary.

The act of Feb. 22, 1875,[4] provides: That before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the treasury, in favor of clerks, marshals or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and, in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and neces-

[1] See McMullen *v.* U. S., 146 U. S. 360.

[2] See U. S. *v.* Carroll, 15 U. S. App. 269.

[3] Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 318.

[4] Act of Feb. 22, 1875, ch. 95, § 1, 18 Stat. L. 333.

sarily performed as therein stated, and that the disbursements charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law and just. United States commissioners shall forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid. Accounts and vouchers of clerks, marshals and district attorneys shall be made in duplicate, to be marked respectively "original" and "duplicate." And it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the treasury, and to retain in his office the duplicates, where they shall be open to public inspection at all times.[1] Nothing contained in this act shall be deemed in any wise to diminish or affect the right of revision of the accounts to which this act applies by the accounting officers of the treasury, as exercised under the laws now in force.[2]

The act of February 22, 1875,[3] provides: That if any clerk of any district or circuit court of the United States shall willfully refuse or neglect to make any report, certificate, statement or other document required by law to be by him made, or shall willfully refuse or neglect to forward any such report, certificate, statement or document to the department, officer or person to whom by law the same should be forwarded, the President of the United States is empowered, and it is hereby made his duty in every such case, to remove such clerk so offending from office by an order in writing for that purpose. And upon the presentation of such order, or a copy thereof, authenticated by the Attorney-General of the United States, to the judge of the court whereof such offender is clerk, such clerk shall thereupon be deemed to be out of office, and shall not exercise the functions thereof. And such district judge, in the

[1] The accounts of marshals, clerks and commissioners are always open to examination under the direction of the Attorney-General: Act of March 3, 1891, ch. 542, par. 7, 26 Stat. L. 948, 1 Supp. R. S. 928.

[2] See also act of March 1, 1879, ch. 125, § 2, 1 Supp. R. S. 222.

[3] Act of Feb. 22, 1875, ch. 95, § 5, 18 Stat. L. 334.

case of the clerk of a district court, shall appoint a successor; and in the case of the clerk of a circuit court the circuit judge shall appoint a successor. And such person so removed shall not be eligible to any appointment as clerk or deputy clerk for the period of two years next after such removal.

The act of February 22, 1875,[1] provides: That if any clerk mentioned in the preceding section shall willfully refuse or neglect to make or to forward any such report, certificate, statement or document therein mentioned, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, in the discretion of the court; but a conviction under this section shall not be necessary as a condition precedent to the removal from office provided for in this act.

The act of July 31, 1894,[2] provides: That before transmission to the Department of the Treasury, the accounts of district attorneys, assistant attorneys, marshals, commissioners, clerks and other officers of the courts of the United States, except consular courts, made out and approved as required by law, and accounts relating to prisoners convicted or held for trial in any court of the United States, and all other accounts relating to the business of the Department of Justice or of the courts of the United States other than consular courts, shall be sent with their vouchers to the Attorney-General and examined under his supervision.

The act of May 28, 1896,[3] provides: That whenever in this act an officer is allowed actual expenses the account therefor shall be made out quarterly, in accordance with rules and regulations prescribed by the Attorney-General. When made out the account shall be verified on oath before an officer authorized to administer oaths. The expense accounts of the marshals and their office deputies and the accounts of the field deputies shall be paid by the marshals; said accounts and the expense accounts of the district attorneys and their assistants, when made out in accordance with this act, shall be submitted to and examined by the circuit court or district court of the district, and when

[1] Act of Feb. 22, 1875, ch. 95, § 6, 18 Stat. L. 334.

[2] Act of July 31, 1894, ch. 174, § 13, 28 Stat. L. 162, etc., 2 Supp. R. S. 218.

[3] Act of May 28, 1896, ch. 252, § 13.

approved by the court shall be audited and allowed as now provided by law. Each marshal shall make such returns of the earnings and expenses of his office as shall be required under rules and regulations prescribed by the Attorney-General: *Provided*, That no office or field deputy shall receive compensation as bailiff, and no field deputy shall receive fees for representing the marshal in court.

The act of May 28, 1896,[1] provides: That any officer whose compensation is fixed by sections six to fifteen, inclusive, of this act who shall directly or indirectly demand, receive or accept any fee or compensation for the performance of any official service other than is herein provided, or shall willfully fail or neglect to account for or pay over to the proper officer any fee received or collected by him shall, upon conviction thereof, be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment, at the discretion of the court, not exceeding five years, or by both such fine and imprisonment.

COMMISSIONERS' FEES.—*Sec.* 847. For administering an oath, ten cents.

For taking an acknowledgment, twenty-five cents.

For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed.

For attending to a reference in a litigated matter in a civil cause at law, in equity or in admiralty, in pursuance of an order of the court, three dollars a day.

For taking and certifying depositions to file, twenty cents for each folio.

For each copy of the same furnished to a party on request, ten cents for each folio.

For issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services.

For issuing any warrant under the tenth article of the treaty of August 9, 1842, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any crime or offence set forth in said article, two dollars.

For issuing any warrant under the provision of the conven-

[1] Act of May 28, 1896, ch. 252, § 18.

tion for the surrender of criminals between the United States and the King of the French, concluded at Washington, November 9, 1843, two dollars.

For hearing and deciding upon the case of any person charged with any crime or offence, and arrested under the provisions of said treaty or of said convention, five dollars a day for the time necessarily employed.

For the examination and certificate in cases of applications for discharge of poor convicts imprisoned for non-payment of a fine or fine and costs, five dollars a day for the time necessarily employed.

The act of May 28, 1896, section 21, provides: That each United States commissioner shall be entitled to the following-named fees and none other: Drawing a complaint, with oath and jurat to same, fifty cents; copy of complaint, with certificate to same, thirty cents; issuing warrant of arrest, seventy-five cents; issuing a commitment and making copy of same, one dollar; entering a return, fifteen cents; issuing subpœna or subpœnas in any one case, with five cents for each necessary witness in addition to the first, twenty-five cents; drawing a bond of defendant and sureties, taking acknowledgment of same and justification of sureties, seventy-five cents; for administering an oath (except to witness as to attendance and travel), ten cents; recognizance of all witnesses in a case when the defendant or defendants are held for court, fifty cents; transcripts of proceedings when required by order of court, and transmission of original papers to court, sixty cents; copy of warrant of arrest, with certificate to same, when defendant is held for court, and the original papers are not sent to court, forty cents; order in duplicate to pay all witnesses in a case: for first witness, thirty cents, and for each additional witness, five cents, and for oath to each witness as to attendance and travel, five cents; for hearing and deciding on criminal charges and reducing the testimony to writing when required by law or order of court, five dollars a day for the time necessarily employed: *Provided*, that not more than one per diem shall be allowed in a case, unless the account shall show that the hearing could not be completed in one day, when one additional per diem may be specially approved and allowed by the court: *Provided, further*, that not more than one

per diem shall be allowed for any one day: *Provided, further*, that no per diem shall be allowed for taking a bond or recognizance and passing on the sufficiency of the bond or recognizance and the sureties thereon when the bond or recognizance was taken after the defendant had been committed to prison upon a final commitment, or has given bond or been recognized for his appearance at court, or when the defendant has been arrested on a capias or bench warrant, or was in custody under any process or order of a court of record. For the examination and certificate in cases of application for discharge of poor convicts imprisoned for non-payment of fine or fine and costs, and all services connected therewith, three dollars; for attending to a reference in a litigated matter, in a civil cause at law, in equity, or in admiralty, in pursuance of an order of the court, three dollars a day; for taking and certifying depositions to file in civil cases, ten cents for each folio; for each copy of the same furnished to a party on request, ten cents for each folio; for issuing any warrant under the tenth article of the treaty of August ninth, eighteen hundred and forty-two, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any parties charged with any crime or offence set forth in said article, two dollars; for issuing any warrant under the provision of the convention for the surrender of criminals between the United States and the King of the French, concluded at Washington, November ninth, eighteen hundred and forty-three, two dollars; for hearing and deciding upon the case of any person charged with any crime or offence, and arrested under the provisions of said treaty or of said convention, five dollars a day for the time necessarily employed.

Such commissioners shall keep a complete record of all proceedings before them in criminal cases, in a well-bound book, which record book shall be delivered to and preserved by the clerk of the district court for such district on the death, resignation, removal or expiration of term of the commissioner, for which record the commissioner shall receive no compensation.

WITNESSES' FEES.—*Sec.* 848. For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for return-

ing. When a witness is subpœnaed in more than one cause between the same parties at the same court, only one travel fee and one per diem compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the per diem attendance fee alone shall be taxed in the other cases in the order in which they are disposed of.[1]

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day.[2]

[1] Fees and mileage of witnesses who are not subpœnaed, but attend voluntarily, are not taxable: Lillienthal *v.* Southern Cal. R. Co., 61 Fed. Rep. 622. For witness fees in the District of Columbia, see act of June 2, 1892, ch. 135, § 1, 27 Stat. L. 60, 2 Supp. R. S. 26, and note.

[2] The term "pursuant to law" is held to apply to witnesses before commissioners only: Cummings *v.* The Akron C. and P. Co., 6 Blatch. 509. A witness is entitled to his fees although he may have been summoned to serve as a juror at the same term, and did so serve: Edwards *v.* Bond, 5 McLean 300; but a party who is called as a witness in his own behalf is not entitled to witness fees: Nichols *v.* Brunswick, 3 Cliff. 88. So, if the testimony of witnesses is taken by consent before a commissioner in another state, and their attendance before such commissioner for this purpose is voluntary, they are entitled to fees: Spaulding *v.* Tucker, 4 Fish 633; 2 Saw. 50. And it may be observed, generally, that a witness who attends in good faith and is examined before any officer pursuant to law, or before a court, is entitled to his fees, although he was not served with a subpœna; and the same may be taxed in a proper case against the adverse party: Dennis *v.* Eddy, 12 Blatch. 195. But if a witness is summoned in several cases, he is allowed a per diem and mileage only in one case, unless the parties are different; and this embraces all cases where the plaintiff is the same, but the defendants are different: Parker *v.* Bigler, 1 Fish 285; Parker *v.* Cartzler, 5 McLean 4.

If a witness is committed for want of a recognizance for his appearance, he is entitled to fees for the whole time he is detained: *In re* Eleanor Higginson, 1 Cr. C. C. 421; and if a case is postponed on account of the sickness of counsel, the fees of witnesses may be taxed for their actual attendance during the postponement: Whipple *v.* Cumberland Cotton Co., 3 Story 84. If a witness has means to pay his traveling expenses to obey a subpœna, it is not necessary to advance them before he is required to obey it: United States *v.* Darling, 4 Biss. 509; The Sunny Side, 5 Ben. 162.

In cases where the United States are successful and the fees are recovered from the defendant, they are not within the provisions of this section and cannot be recovered from the United States. The section refers to suits in which the United States were unsuccessful, and also to suits where services are required and no fees are taxed to the defendant: United States *v.* Cigars, 37 Leg. Int. 237.

The act of February 25, 1897,[1] provides: That it shall hereafter be unlawful for any United States marshal or deputy marshal, or any clerk or deputy clerk of any court of the United States or of any territory thereof, or any United States attorney or assistant attorney, or any United States judge, or United States commissioner, or other person holding any office, employment or position of trust or profit under the government of the United States to purchase, at less than the full face value thereof, either directly or indirectly, any claim for fee, mileage or expenses of any witness, juror, deputy marshal or of any other officer of court whatsoever against the United States government. Any person who shall violate this act shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not exceeding one thousand dollars.

No officer of court to have witness fees.—*Sec.* 849. No officer of the United States courts in any state or territory, or in the District of Columbia, shall be entitled to witness fees for attending before any court or commissioner where he is officiating.

Expenses of clerks and other officers when sent away as witnesses.—*Sec.* 850. When any clerk or other officer of the United States is sent away from his place of business as a witness for the government, his necessary expenses, stated in items and sworn to, in going, returning and attendance on the court, shall be audited and paid; but no mileage, or other compensation in addition to his salary, shall in any case be allowed.

Seamen sent home as witnesses.—*Sec.* 851. There shall be paid to each seaman or other person who is sent to the United States from any foreign port, station, sea or ocean, by any United States minister, chargé d'affaires, consul, captain or commander, to give testimony in any criminal case depending in any court of the United States, such compensation, exclusive of subsistence and transportation, as such court may adjudge to be proper, not exceeding one dollar for each day necessarily employed in such voyage and in arriving at the place of examination or trial. In fixing such compensation, the court shall take into consideration the condition of said seaman or witness, and whether his voyage has been broken up, to his injury, by his being sent to the United States.

[1] Act of February 25, 1897, ch. 316, 29 Stat. L. 595, 2 Supp. R. S. 563.

When such seaman or person is transported in an armed vessel of the United States, no charge for subsistence or transportation shall be allowed. When he is transported in any other vessel, the compensation for his transportation and subsistence, not exceeding in any case fifty cents a day, may be fixed by the court, and shall be paid to the captain of said vessel accordingly.

JURORS' FEES.—*Sec.* 852, as amended by the act of June 30, 1879.[1] For actual attendance at any court or courts, and for the time necessarily occupied in going to and returning from the same, two dollars a day during such attendance.

For the distance necessarily traveled from their residence in going to and returning from said court by the shortest practicable route, five cents a mile.

The act of June 16, 1880,[2] provides: That jurors and witnesses in the district and circuit courts of the United States in and for the state of Colorado shall be entitled to receive fifteen cents for each mile actually traveled in coming to or returning from said courts.

The act of August 3, 1892,[3] provides: That jurors and witnesses in the United States Courts in Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, New Mexico, Arizona and Utah, shall be entitled to and receive fifteen cents for each mile necessarily traveled over any stage line or by private conveyance, and five cents for each mile over any railway in going to and returning from said courts: *Provided*, That no constructive or double milage fees shall be allowed by reason of any person being summoned both as witness and juror, or as witness in two or more cases pending in the same court and triable at the same term thereof.

PRINTERS' FEES.—*Sec.* 853. For publishing any notice or order required by law, or the lawful order of any court, department, bureau, or other person, in any newspaper, except as mentioned in sections 3823, 3824 and 3825, title "Public Printing, Advertisements and Public Documents," forty cents per folio for the first insertion and twenty cents per folio for each subsequent insertion. The compensation herein provided shall include the

[1] Act of June 30, 1879, ch. 52, § 2, 21 Stat. L. 290.

21 Stat. L. 43.

[2] Act of June 16, 1880, ch. 247, § 1, 21 Stat. L. 290.

[3] Act of August 3, 1892, ch. 361, 27 Stat. L. 347, 2 Supp. R. S. 65.

furnishing of lawful evidence, under oath, of publication, to be made and furnished by the printer or publisher making such publication.

The act of June 20, 1878,[1] provides: That hereafter all advertisements, notices, proposals for contracts, and all forms of advertising required by law for the several departments of the government may be paid for at a price not to exceed the commercial rates charged to private individuals, with the usual discounts; such rates to be ascertained from sworn statements to be furnished by the proprietors or publishers of the newspapers proposing so to advertise. But the heads of the several departments may secure lower terms at special rates whenever the public interest requires it.

MEANING OF THE TERM FOLIO.—*Sec.* 854. The term folio, in this chapter, shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted except when the whole statute, notice or order contains less than fifty words.

The act of March 3, 1877,[2] provides: And there shall be taxed against the losing party in each and every cause pending in the Supreme Court of the United States, or in the Court of Claims of the United States, the cost of printing the record in such case, which shall be collected, except when the judgment is against the United States, by the clerks of said courts respectively, and paid into the treasury of the United States.

FEES OF WITNESSES; HOW PAID AND RECOVERED.—*Sec.* 855. In cases where the United States are parties, the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the treasury in his accounts.

OTHER FEES; HOW PAID.—*Sec.* 856. The fees of district attorneys, clerks, marshals and commissioners, in cases where the United States are liable to pay the same, shall be paid on settling their accounts at the treasury.

[1] Act of June 20, 1878, ch. 359, pars. 4, 5, 20 Stat. L. 206, 1 Supp. R. S. 202.

[2] Act of March 3, 1877, ch. 105, 19 Stat. L. 344.

The act of March 3, 1887,[1] provides: That hereafter no part of the appropriations made for the payment of fees for United States marshals or clerks shall be used to pay the fees of United States marshals or clerks upon any writ or bench warrant for the arrest of any person or persons who may be indicted by any United States grand jury or against whom an information may be filed where such person or persons is or are under a recognizance taken by or before any United States commissioner or other officer authorized by law to take such recognizance, requiring the appearance of such person or persons before the court in which such indictment is found or information is filed, and when such recognizance has not been forfeited or said defendant is not in default, unless the court in which such indictment or information is pending orders a warrant to issue; nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk or marshal for attendance in court except for days when the court is open by the judge for business or business is actually transacted in court, and when they attend under sections 583, 584, 671, 672 and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts.

FEES; HOW RECOVERED.—*Sec.* 857. The fees and compensations of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the treasury, shall be recovered in like manner as the fees of the officers of the states respectively for like services are recovered.[2]

[1] Act of March 3, 1887, ch. 362, par. 8, 24 Stat. L. 509, etc.. 1 Supp. R. S. 564.

[2] An action under the act of March 3, 1887, against the United States to recover a clerk's fees is an action at law properly reviewable in a circuit court of appeals by writ of error and not by appeal: U. S. *v.* Fletcher, 8 U. S. App. 481. A peculiar local system of collection does not prevail in the federal courts sitting in the locality: The Whisper, 13 *id.* 394.

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